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1 IN THE CIRCUIT COURT FOR THE 11TH JUDICIAL CIRCUIT
2 IN AND FOR DADE COUNTY, FLORIDA

3 GENERAL JURISDICTION DIVISION

4 Case No. 00-01706 CA 22

5
6 LYNN FRENCH,

7 Plaintiff,

8 vs.

9 PHILIP MORRIS INCORPORATED,

("PHILIP MORRIS U.S.A."),

10 R.J. REYNOLDS TOBACCO COMPANY,

LORILLARD TOBACCO CO., and

11 BROWN & WILLIAMSON TOBACCO

CORP., Individually and as Successor

12 to the AMERICAN TOBACCO COMPANY,

13 Defendants.

14 ----- /
15 VOLUME 7

PROCEEDINGS BEFORE

16 THE HONORABLE FREDRICKA G. SMITH

17 June 6, 2002

9:30 a.m. to 12:30 p.m.

18
19
20
21
22
23
24 73 West Flagler Street

Court Room 6-2

25 Miami, Florida 33130

1 Appearances:
 2 On Behalf of the Plaintiff:
 3 GROVER WEINSTEIN & TROP
 4 66 West Flagler Street
 5 Concord Building, 7th Floor
 6 Miami, Florida 33131
 7 (305) 377-4840
 8 BY: MARVIN WEINSTEIN, ESQ.
 9 ADAM TROP, ESQ.
 10 RHONDA WEINSTEIN, ESQ.
 11
 12 On Behalf of the Defendants Philip Morris
 13 Incorporated ("Philip Morris U.S.A.") and
 14 Lorillard Tobacco Co.:
 15 SHOOK HARDY & BACON
 16 201 South Biscayne Boulevard
 17 Miami, Florida 33131
 18 (305) 358-5171
 19 BY: KENNETH REILLY, ESQ.
 20 GAY TEDDER, ESQ.
 21 On Behalf of the Defendant R.J. Reynolds
 22 Tobacco Company:
 23 WOMBLE CARLYLE SANDRIDGE & RICE, LLP
 24 One West Fourth Street
 25 Winston-Salem, North Carolina 27101
 (336) 721-3549
 BY: JONATHAN ENGRAM, ESQ.
 On Behalf of the Defendant Brown & Williamson
 Tobacco Corp., Individually and as Successor to
 the American Tobacco Company:
 ADORNO & YOSS, P.A.
 2601 South Bayshore Drive, Suite 1600
 Miami, Florida 33133
 (305) 858-5555
 BY: WILLIAM C. McCUE, ESQ.

(Jury not present)
 THE COURT: Have a seat everyone. I wasn't
 sure whether the jurors were all here, but apparently
 they are.
 Who will be your first witness?
 MR. TROP: Mr. Brown, Edward Jason Brown.
 THE COURT: Somehow I thought we had already
 taken him because of the proffer, but he hasn't
 appeared before the jury.
 (Jury present.)
 THE COURT: Everyone have a seat. Good
 morning.
 JURORS: Good morning.
 THE COURT: Will the plaintiff call your
 next witness, please?
 MR. TROP: Yes, your Honor. We call Edward
 Jason Brown.
 Thereupon,
 EDWARD JASON BROWN,
 called as a witness by the plaintiff, being first duly
 sworn, testified as follows:
 DIRECT EXAMINATION
 BY MR. TROP:
 Q Good morning, Mr. Brown.
 A Good morning.

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Q Could you state your full name for the record
 and for the jury?
 A Edward Jason Brown.
 Q Mr. Brown, tell the jury where you live.
 A I live in **DELETED**
 Q Mr. Brown, I understand you are a retired
 airline pilot?
 A Yes. From Northwest Airlines.
 Q Could you tell the jury generally your
 particular background and experience with regard to
 airplanes?
 A I was an aircraft mechanic in 1971 with the
 Air Force, servicing, maintaining, maintenance in
 large passenger aircraft. After four years in the Air
 Force, I went to the Army as a pilot. In the Army I
 was a maintenance officer. I maintained, was in
 charge of seven multimillion-dollar aircraft, the
 personnel and maintenance. I was also a test pilot.
 Then after the Army I was a police officer.
 I flew a police aerial assault team. And then after
 the police, I was a Civil Service flight instructor,
 GS 12. Then after that I was an airline pilot for
 Atlantic Southeast Airlines, a Delta Connection; then
 with Republic Airlines and we merged with Northwest
 Airlines. I have about 25 years basic experience.

1 Q Mr. Brown, are you a licensed pilot?
 2 A Yes, I am. Yes, I am, licensed airline
 3 transport pilot.
 4 Q Is that for private and commercial airlines?
 5 A Yes. I am licensed to fly all single,
 6 multi-engine aircraft.
 7 Q Do you have any other licenses or ratings
 8 with respect to airplanes or airlines?
 9 A I also hold a flight engineer's rating where
 10 I maintain all the systems in flight on a Boeing 727,
 11 a turbojet airliner.
 12 Q You said 727. Could you just basically
 13 describe what kind of -- I think most people probably
 14 heard it, what kind of airline that is and tell the
 15 jury about your experience flying 727's.
 16 A Well, it is roughly 144 passengers. Most of
 17 the airlines used it and it is a pretty good airliner.
 18 I was the flight engineer on that probably about two
 19 years.
 20 Q What years basically did you fly the 727's?
 21 A I think from around 1987 to 1989.
 22 Q When you were a pilot and worked on 727's,
 23 was smoking permitted in the cabins?
 24 A Yes, it was.
 25 Q Could you tell the jury basically what your

1 flashlight to get around?
 2 A Yes, indeed. When it is dark, most of those
 3 flights were in the morning, the redeye or so. To
 4 see, I would need to shine my flashlight. As you
 5 recalled, they have the lights, the row lighting. You
 6 have to follow the lights with your flashlight and see
 7 where you are going.
 8 Q Now, you said a moment ago that the smoke
 9 would make your eyes water. Did it have any other
 10 physical affects on you?
 11 A I was bothered, my sinuses.
 12 Q Did you notice any of the same visual --
 13 visually did you notice any of the same things
 14 happening to other flight attendants, to flight
 15 attendants or passengers?
 16 A Yes, I did. It's a terrible job to be there
 17 walking back and forth. We sit down when we are
 18 flying, but flight attendants walk everywhere they go
 19 and I noticed a lot of problems. Nasal congestion.
 20 Q As one of your responsibilities on the
 21 flight, were you in charge of what we have been
 22 calling the no smoking signs?
 23 A You know, I don't remember. I don't remember
 24 where that switch was.
 25 Q Are you aware of whether from time to time

1 responsibilities -- aside from being a pilot, but what
 2 your responsibilities were that would from time to
 3 time take you into the cabin?
 4 A I would respond to the flight attendants
 5 queries or if they asked me to come back to note
 6 anything that's wrong with the airplane, any strange
 7 noises, irate passengers, passenger requests and their
 8 overall being uncomfortable.
 9 Q Were you familiar with the conditions on the
 10 727 when smoking was permitted, as you said, in '87,
 11 '88, '89?
 12 A Yes. Especially on long flights. I flew
 13 from Detroit to San Francisco, Detroit-Seattle, four
 14 and a half, five hour flights, and as I would come out
 15 of the cockpit door with my flashlight, I would see a
 16 smoke-filled cabin and the easy way to describe that
 17 is like a smoke filled barroom. Your eyes would
 18 water, your vision was impaired.
 19 One thing about a barroom, you can walk
 20 around or even leave the barroom, but in the aircraft,
 21 in its confined cabin, you just have to stay there.
 22 Right in it. There is n where to go. Changing seats
 23 wouldn't make a difference.
 24 Q You mentioned your having your flashlight.
 25 Were there times when you actually needed this

1 there had been requests to turn on the no smoking
 2 sign?
 3 A Yes.
 4 Q Under what circumstances would that happen?
 5 A You have all the smoke in there and you
 6 couldn't do anything with it, it's just there, so to
 7 limit the conditions, we had to turn on the no smoking
 8 sign until everybody put them out, if we got too many
 9 complaints.
 10 Q You mentioned seeing visually what happened
 11 to people and seeing the smoke. Did you ever see any
 12 evidence of the smoke on anything inside the plane?
 13 A Yes. As a flight engineer, I inspected the
 14 aircraft before a flight. I checked the cabin vents,
 15 the gas pers, the air vents, individual air vents, a
 16 brown substance would appear to be tar or nicotine
 17 along the side walls of the aircraft from I guess the
 18 front of that wall there all the way back here maybe,
 19 that's how long the airplane is, and on the sides you
 20 see vents, louvres, and you see the stains on there as
 21 well.
 22 Q Mr. Brown, are you aware if the 727, for
 23 instance, had any ventilation systems that would do
 24 something with the air?
 25 A It didn't do much to the smoke. It

1 distributed the air, but the smoke was still there.

2 Q That was going to be my next question. What
3 effect, if any, did these ventilation systems or
4 whatever kind of system they are going to call it,
5 what effect did it have on the smoke in the air as you
6 described earlier?

7 A Practically none.

8 Q Mr. Brown, did you have opportunities to fly
9 on 727's and other airplanes since the domestic
10 smoking ban in 1990?

11 A Yes, of course.

12 Q Have you noticed any differences between the
13 air quality before 1990 and after 1990?

14 A Yes, indeed. As a matter of fact, Northwest
15 was the first airline to ban the smoking. We had an
16 aggressive attempt to clean up everything, all the
17 airplanes, including the upholstery, the pillows and
18 all that were stained and smelly.

19 So it was cleaned up after that and we are
20 proud of that and it was one of our marketing tools.

21 Q Mr. Brown, you and I just met yesterday; is
22 that correct?

23 A Yes.

24 Q Do you have any kind of stake or interest or
25 anything in the outcome of this litigation against the

1 the environmental control systems on the aircraft; is
2 that correct?

3 A That's correct.

4 Q You talked about being in the Army on direct
5 exam?

6 A Yes.

7 Q But you didn't fly commercial jet aircraft in
8 the Army; is that correct?

9 A That's correct. Well, I did fly. I was in
10 the Army National Guard and with the airlines also.

11 Q But you weren't the pilot on those flights,
12 correct?

13 A Yes, I was.

14 Q But those aren't commercial jet aircraft,
15 correct?

16 A I'm saying while I was in the Army National
17 Guard, I was also an airline pilot currently.

18 Q When you were in the National Guard, the only
19 plane that you flew held two people, correct?

20 A That's correct.

21 Q You didn't fly for a commercial airline until
22 you flew for Atlantic Southeastern Airlines; is that
23 correct?

24 A That's correct.

25 Q That was a Delta Connection commuter?

1 tobacco companies?

2 A No, I don't.

3 Q Have you known Ms. French for more than a
4 day?

5 A No, I met her yesterday.

6 MR. TROP: Thank you very much, sir.

7 THE WITNESS: Thank you.

8 THE COURT: Just a moment. You may inquire.

9 CROSS-EXAMINATION

10 BY MS. TEDDER:

11 Q Good morning, Mr. Brown.

12 A Good morning. How are you?

13 Q I am fine. How are you today?

14 A Fine, thank you.

15 Q Good.

16 You said on direct exam that you had
17 previously been in the Air Force; is that correct?

18 A That's correct.

19 Q But you were not an Air Force pilot?

20 A That's correct, I was not.

21 Q You were a mechanic in the Air Force,
22 correct?

23 A Yes.

24 Q When you were in the Air Force, were you not
25 one of the mechanics who specialized in maintaining

1 A Yes.

2 Q You started with them in 1985?

3 A Yes.

4 Q You are no longer a pilot, correct?

5 A That's correct.

6 Q You haven't flown a commercial aircraft since
7 1995, correct?

8 A That's correct.

9 Q So your commercial flying career lasted
10 approximately between 1985 and 1995; isn't that
11 correct?

12 A Yes.

13 Q You went to work for Republic Airlines in
14 1986?

15 A Yes.

16 Q Within two to three years after you joined
17 Republic Airlines, they merged with Northwest
18 Airlines, correct?

19 A Yes.

20 Q Northwest Airlines banned smoking on all of
21 their domestic flights on April 23, 1988, correct?

22 A The ones less than two hours.

23 Q In fact, isn't it true, Mr. Brown, that
24 Northwest banned smoking not just on flights of two
25 hours in 1988, but on all of their domestic flights on

1 March 23, 1988, isn't that correct?
 2 A I am not sure.
 3 Q You are not sure?
 4 A No.
 5 Q Okay. Well, let me see if I can refresh your
 6 recollection.
 7 MS. TEDDER: May I approach, your Honor?
 8 THE COURT: You may.
 9 Q I would like for you to take a look at this.
 10 MR. TROP: Your Honor, may I see what that
 11 is?
 12 THE COURT: Of course.
 13 MS. TEDDER: Shall I show it to him?
 14 THE COURT: Please.
 15 Q Just let me know when you have had an
 16 opportunity to review it.
 17 A Okay. Read the whole thing?
 18 Q No, I don't think you have to read the whole
 19 thing. You just have to read through here, that first
 20 paragraph.
 21 A Okay, thank you.
 22 Q Does that, Mr. Brown, refresh your
 23 recollection that Northwest banned smoking not just on
 24 flights of two hours or less, but on all of their
 25 domestic flights as of March 23, 1988?

1 A I'm still not certain.
 2 Q But if that's what the record reflects, you
 3 don't have any reason to dispute that, do you?
 4 A No, I don't.
 5 Q Assuming that's correct, then, you worked on
 6 commercial aircraft for only two to three years when
 7 smoking was allowed on domestic flights, correct?
 8 That would be correct, yes?
 9 I'm sorry, you have to answer audibly for the
 10 reporter?
 11 A I haven't done the math, but if you have done
 12 it.
 13 Q '85 to '88, about three years?
 14 A Three years, yes.
 15 Q You don't know anything about Ms. French's
 16 exposure to second-hand smoke while a flight
 17 attendant; is that correct?
 18 A No, I don't.
 19 Q You don't know what routes Ms. French flew?
 20 A No, I don't.
 21 Q You don't know what aircraft Ms. French flew
 22 on as a flight attendant?
 23 A I assume she flew on a 727.
 24 Q Other than that, you don't know about any
 25 other aircraft she flew on?

1 A No, I don't.
 2 Q If she flew on the L-1011, you were never a
 3 pilot on that aircraft; is that correct?
 4 A No, I never was.
 5 Q You don't know anything about the ventilation
 6 system on that aircraft, correct?
 7 A No, I don't.
 8 Q If she flew on the 747, you were never a
 9 pilot on that aircraft; is that correct?
 10 A That's correct.
 11 Q You don't know anything about the ventilation
 12 system on that aircraft, correct?
 13 A Well, the 747 is the same as the 727.
 14 Q But you are not specifically familiar with
 15 the ventilation system on a 747, correct?
 16 A No, I am not.
 17 Q And you don't know anything about how often
 18 the air was completely replaced in the cabin on a 747,
 19 correct?
 20 A No, I don't.
 21 Q And you don't know that about an L-1011
 22 either; is that correct?
 23 A No, I don't.
 24 Q The same thing would be true for a 757,
 25 correct?

1 A That's correct.
 2 Q The same thing would be true for the MD-80,
 3 correct?
 4 A No.
 5 Q You were never a pilot on the MD-80; is that
 6 correct?
 7 A That's correct.
 8 Q All right.
 9 A It's the same DC-9 extended.
 10 Q In the airplane that you flew for Atlantic
 11 Southeastern, that was called a short 360; is that
 12 correct?
 13 A Yes, it was.
 14 Q That plane only held 35 people, correct?
 15 A Approximately, yes.
 16 Q You were not the captain on the short 360,
 17 correct?
 18 A That's correct.
 19 Q When you flew the 727, you weren't the
 20 captain or the second officer, correct?
 21 A Yes, I was the second officer.
 22 Q I'm sorry, you weren't the captain, you were
 23 the second officer, correct?
 24 A Yes, I was.
 25 Q You don't know whether any of the aircraft

1 Ms. French flew on were airplanes with a one pass
 2 circulation system, do you?
 3 A No, I don't.
 4 Q You don't know how many of those would have
 5 recirculated air, if any; is that correct?
 6 A No, I don't.
 7 Q You talked a little bit on direct exam about
 8 flight attendants talking about smoke on the aircraft;
 9 do you recall that testimony?
 10 A You can refresh me some.
 11 Q You talked a little bit on direct exam about
 12 what you saw in the cabin, okay, and what you observed
 13 when smoke was on the aircraft, correct?
 14 A Yes.
 15 Q When you flew for Northwest Airlines, you
 16 flew, you mentioned, the 727, correct?
 17 A Yes.
 18 Q And that plane, I think you said, held about
 19 144 people, correct?
 20 A Yes.
 21 Q And on that plane the pilot can control the
 22 ventilation system, correct?
 23 A We did, I believe, yes.
 24 Q And the pilot could increase the ventilation
 25 if he chose to do so, correct?

1 A We can adjust it for passenger comfort.
 2 Q Okay, and you could in fact increase it if
 3 you chose to do so, correct?
 4 A Increase what?
 5 Q The ventilation in the aircraft.
 6 A We increased the temperature, things like
 7 that.
 8 Q You could in fact increase the ventilation,
 9 couldn't you, Mr. Brown?
 10 A I don't know if that's a good enough
 11 statement, to increase the ventilation. We can do
 12 things to adjust it is mainly what we do.
 13 Q Do you recall giving a deposition in this
 14 case?
 15 A Yes.
 16 Q Do you recall that that deposition was taken
 17 on January 21?
 18 A Yes, I do.
 19 Q Do you recall in that deposition being asked
 20 the following question and giving the following
 21 answer:
 22 This is page 99, line 13 through 15. Do you
 23 recall being asked the following question and giving
 24 the following answer:
 25 "Q. You could increase the ventilation if

1 you chose?
 2 "A. Yes, airflow."
 3 Do you recall giving that answer to that
 4 question?
 5 A Yes.
 6 Q And that testimony was true and correct when
 7 you gave it, correct?
 8 A Yes. To the best of my knowledge.
 9 Q And it is true today, correct?
 10 A Yes.
 11 Q The captain could also turn on the no smoking
 12 sign, correct?
 13 A Yes.
 14 Q If there were problems.
 15 And if the plane recirculated air, you could
 16 turn off the recirculation, correct?
 17 A There was a recirculation switch that if
 18 something were to fail, if the system were to fail,
 19 you can allow it to recirculate or stop recirculating,
 20 I believe.
 21 Q So if in fact you thought there were problems
 22 with the smoke on the airplane and the plane
 23 recirculated air, you could turn off the
 24 recirculation, correct?
 25 A No. No.

1 Q Okay. Again, I would ask you if you recall
 2 giving a deposition in this case on January 21, 2001?
 3 A Yes, I do.
 4 Q Again, I am looking at page 99, lines 19
 5 through 21.
 6 Do you recall being asked the following
 7 question and giving the following answer:
 8 "Q. You could, if the plane recirculated
 9 air, turn off the recirculation fans, couldn't
 10 you?
 11 "A. Yes."
 12 Do you recall giving that answer to that
 13 question on January 21, 2001?
 14 A Yes. As I stated, there is a recirculating
 15 fan switch which you have the ability to turn on and
 16 off.
 17 Q Okay.
 18 A But within a set procedure, not at your
 19 discretion.
 20 Q You could also adjust -- if you thought there
 21 were problems with smoke on the aircraft, could you
 22 also adjust the pressurization, increasing the rate,
 23 correct?
 24 A The rate of discharge, yes.
 25 Q And it's also true, isn't it, Mr. Brown, that

1 if you received complaints, you did just those things
 2 we mentioned, correct?
 3 A Those things I had available to me for
 4 passenger comfort.
 5 Q I'm sorry, I don't mean to cut you off.
 6 A Okay. To adjust the ventilation, the cabin
 7 pressurization for passenger comfort, yes.
 8 Q And you didn't just have them available, you
 9 in fact did those things we mentioned, correct?
 10 A Certainly.
 11 Q You also said on direct exam, I think, that
 12 you observed smoke in the cabin of the aircraft,
 13 correct?
 14 A That's correct.
 15 Q Your job was in the cockpit, not in the
 16 cabin, correct?
 17 A No. My job is throughout the entire aircraft
 18 as assigned.
 19 Q I'm sorry, you stop and I think it's my turn
 20 to talk, so I don't mean to cut you off.
 21 A Okay.
 22 Q Would it be fair to say that you spent most
 23 of your time in the cockpit and not in the cabin?
 24 A That would be fair to say, yes.
 25 Q In fact, you would characterize your trips to

1 the cabin as an infrequent occurrence?
 2 A Yes.
 3 Q And in fact when you worked for Atlantic
 4 Southeast Airlines, the average length of the flight
 5 you flew was approximately an hour, correct?
 6 A That's correct.
 7 Q When you were working for Atlantic
 8 Southeastern Airlines flying an hour or so at most,
 9 you could often go through an entire flight without
 10 going to the back of the cabin, correct?
 11 A Atlantic Southeast Airlines, yes.
 12 Q You also, on those occasions when you were in
 13 the cabin, in the front of the cabin, and there was
 14 smoke in the cabin, you could still see the back of
 15 the airplane, correct?
 16 A Yes.
 17 Q You mentioned a couple of problems that I
 18 think you had when you were exposed to smoke on direct
 19 exam, correct; do you remember talking about stuffy
 20 nose?
 21 A Yes.
 22 Q When you are not around smoke you don't have
 23 those problems, correct?
 24 A That's correct.
 25 MS. TEDDER: If you will give me just a

1 moment, your Honor.
 2 Thank you. I am finished.
 3 THE WITNESS: Thank you.
 4 THE COURT: Is there anything further?
 5 MR. TROP: Yes. Just very briefly.
 6 REDIRECT EXAMINATION
 7 BY MR. TROP:
 8 Q Mr. Brown, Ms. Tedder referred to your
 9 deposition where you gave some answers and I guess you
 10 had to refresh your recollection.
 11 Do you remember giving your deposition?
 12 A Yes, I do.
 13 Q It was Mr. Gerrity who was asking you
 14 questions?
 15 A Yes.
 16 Q How long did that deposition go?
 17 A About five months.
 18 Q How long did the actual questioning go?
 19 A About four and a half hours they drilled me.
 20 Q That was up in Atlanta?
 21 A Yes.
 22 Q You mentioned also that there were times when
 23 you would be affected by the smoke yourself?
 24 A Yes.
 25 Q You as a pilot, did you have anything you

1 could do to alleviate the problems you had?
 2 A I was fortunate, I could go up to the cockpit
 3 and get on my oxygen mask and breathe and clear my
 4 problems up.
 5 Q Did the passengers and flight attendants have
 6 that same capability?
 7 A No.
 8 Q You were asked a little bit about the
 9 ventilation system. Did you have the authority or do
 10 any of the pilots have the authority to just flick it
 11 on and flick it off at any time they felt they wanted
 12 to?
 13 A No.
 14 Q Do you have some kind of procedure that you
 15 needed to do?
 16 A We have to follow procedure. Everything we
 17 do is -- most everything we do is by procedure.
 18 Q Is that obviously for safety reasons of the
 19 people on board?
 20 A Yes. Yes.
 21 MR. TROP: Thank you very much, Mr. Brown.
 22 THE WITNESS: You are welcome.
 23 THE COURT: You may be excused.
 24 THE WITNESS: Thank you.
 25 (Witness excused)

1 THE COURT: Call your next witness, please.
 2 Who will that be?
 3 MR. REILLY: May we have a brief side bar?
 4 THE COURT: We can have a brief side bar
 5 conference, but you can get your next witness in.
 6 (At the sidebar.)
 7 MR. REILLY: Your Honor, I object very
 8 strenuously to the questioning of these witnesses
 9 about the length of their depositions. It's
 10 highly improper. It is highly improper for these
 11 witnesses to say "I was grilled for four hours."
 12 It's completely inappropriate.
 13 THE COURT: I think it has to be relevant to
 14 something. Like if they say -- if they are
 15 saying now that what they said at deposition was
 16 wrong or they were confused or something like
 17 that, then it may be relevant how long the
 18 deposition was or how it was conducted, but
 19 otherwise, I don't think it has that much
 20 relevance.
 21 MR. ENGRAM: They had opportunities to read
 22 and sign the deposition and make any corrections.
 23 THE COURT: Wait a minute. He didn't say
 24 that. He wasn't saying now at trial that his
 25 deposition testimony was wrong or anything, so I

1 agree that it was kind of -- what's the word I am
 2 trying to think of? Not fortuitous, the word
 3 that sounds like fortuitous. Anyway, I think
 4 it's like thrown in there.
 5 MR. TROP: Judge, in cross-examination by
 6 Ms. Tedder, she took two very small points on a
 7 200 page deposition where he answered yes and
 8 didn't put like a yes comma and some other little
 9 explanation. He didn't have it exactly right, so
 10 she cross-examined him in an attempt to impeach
 11 him and make him look perhaps dishonest. So I
 12 have the right to -- either dishonest or
 13 ignorant.
 14 So I have the right to explain to him, to
 15 let the jury know that he was asked hours and
 16 hours and hours of questions and these are two
 17 little things that he just misspoke about and did
 18 not recall. That's perfectly proper.
 19 MR. REILLY: No, it is completely improper.
 20 That is exactly what the rules don't permitted.
 21 The case law is replete that you cannot simply
 22 say to someone was your deposition lengthy, was
 23 it grueling?
 24 THE COURT: You can under certain
 25 circumstances. Frankly, I didn't think there was

1 much impeachment.
 2 MR. REILLY: True.
 3 THE COURT: In other words, I don't think
 4 that there was a need to rehabilitate him in the
 5 sense of explaining how long the deposition was.
 6 Anyway, let's go on. I don't know if this
 7 will come up again or not. Only if it bears some
 8 connection to the questioning.
 9 I see the plaintiff's position is that he
 10 was impeached. I don't think he was very greatly
 11 impeached, but whatever.
 12 MR. TROP: It wasn't lengthy, but still it
 13 was an attempt to --
 14 THE COURT: But he didn't say "I had trouble
 15 understanding the questions" or "I was tired."
 16 You know, he didn't say anything like that. I
 17 thought it was gratuitous. That's the word I was
 18 trying to think of, gratuitous.
 19 MR. REILLY: Your Honor, people making
 20 comments like I was grilled for four hours.
 21 THE COURT: That came from the witness, it
 22 didn't come from the question.
 23 MR. REILLY: That's what I mean. Everybody
 24 would have to be asleep at the switch to think
 25 that that was something that was done without

1 knowledge, that question and answer.
 2 THE COURT: That it was done what?
 3 MR. REILLY: That it was done without
 4 knowledge.
 5 THE COURT: You mean he asked the question
 6 expecting he was going to answer that way?
 7 MR. TROP: We will bring him in and ask him
 8 if we talked that way.
 9 MR. REILLY: We have had two witnesses who
 10 said she was grilled for an hour and a half, it
 11 seemed like three hours, and now we have a second
 12 witness who says "I was grilled for four hours."
 13 This is not a coincidence.
 14 THE COURT: This is not my view.
 15 MR. TROP: I would request to bring him in
 16 outside of the jury.
 17 THE COURT: No, I happen to take your
 18 position. Let's go ahead.
 19 (Continued on next page.)
 20
 21
 22
 23
 24
 25

1 (Jury present.)
 2 Thereupon,
 3 KATE JEWEL,
 4 called as a witness by the plaintiff, being first duly
 5 sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. WEINSTEIN:
 8 Q Please state your name.
 9 A Kate Jewel.
 10 Q Where do you live?
 11 A

12 DELETED
 13
 14
 15
 16

17 A It's probably about as far away from here as
 18 you can get.
 19 Q I guess there is Hawaii.
 20 A That's true. I mean the contiguous states.
 21 Q The jury has already heard a lot of testimony
 22 from other airline attendants, so I am going to try to
 23 be brief.
 24 Tell the jury about your background, your
 25 family background.

1 A My family background?
 2 Q Yes. In other words, what does your family
 3 consist of, who lives home with you, children, things
 4 like that?
 5 A I am single and I have two cats.
 6 Q What is your present occupation?
 7 A I am a flight attendant.
 8 Q Tell the jury how long you have been a flight
 9 attendant and really just summarize your history with
 10 being a flight attendant and who you were employed
 11 with from the first days and up until now.
 12 A I have been a flight attendant with American
 13 Airlines since July of 1970 and I continue to be so
 14 today.
 15 Q So that's approximately 30 years you have
 16 been a flight attendant?
 17 A It will be 32 at the end of July.
 18 Q Tell the jury the type of aircraft that you
 19 have worked on as a flight attendant throughout the
 20 years.
 21 THE COURT: Excuse me for interrupting. How
 22 about limiting to the time that we are concerned
 23 with?
 24 MR. WEINSTEIN: Yes, thank you, Judge.
 25 Q Let's try to limit your testimony from 1976

1 forward, so to speak.
 2 A Okay.
 3 Q In 1976 and thereon, up until approximately
 4 1990, what were the circumstances and conditions
 5 regarding smoking on the aircraft that you flew and
 6 tell the jury the type of aircraft that you did fly.
 7 A I flew 727's. I believe I was still flying
 8 707's. I'm not sure when I started flying DC-10's,
 9 but sometime in that timespan.
 10 Q Was smoking permitted between 1976 up to
 11 approximately 19 -- well, 1988, '89, '90?
 12 A Yes.
 13 Q How about international, was it permitted up
 14 until about 1995 or '96?
 15 A It was permitted longer on the international
 16 flights.
 17 Q During the period of time that smoking was
 18 permitted between the years that you mentioned,
 19 explain to the jury where the smoking sections were
 20 and what the general atmosphere was like. As I said,
 21 they heard testimony already, so I am trying to move
 22 things along.
 23 A I don't remember exactly when smoking
 24 sections started, so I'm not sure if the time period
 25 that I am supposed to talk about is in when there was

1 no smoking sections, but in the beginning of the
 2 smoking sections it was like half the cabin was
 3 designated smoking, the other half was designated
 4 nonsmoking.
 5 Q Were there separate smoking sections in first
 6 class?
 7 A Yes. The last couple of rows of first class
 8 might be -- depending upon how big first class was.
 9 Q Was there also a separate smoking section in
 10 business class?
 11 A I never flew business class.
 12 Q How about in what we call, what's the other
 13 class?
 14 A Coach.
 15 Q Coach. Tell the jury whether or not there
 16 was a separate section?
 17 A Approximately the last half of coach was
 18 designated smoking when they started designating that
 19 there were sections.
 20 Q Tell the jury generally what your duties were
 21 as a flight attendant.
 22 A We served the cabin from a galley that was in
 23 the back, except for one aircraft, always in the back
 24 half of the airplane where the smoking section was.
 25 We would travel through the smoke, usually starting

1 the service in the beginning of the cabin working
2 back.

3 Q What was the general environment over those
4 years in terms of your being subjected, you along with
5 other airline attendants, what was the environment
6 like?

7 A You couldn't escape it. Even if you were in
8 the first row of coach, there would be smoke from the
9 last row of first class. It was all over the
10 airplane. It was heavier in the smoking sections, but
11 it was everywhere.

12 Q Could you actually see the smoke as you
13 walked through those --

14 A You could see it, you could smell it.

15 Q What did it do to you personally, you in
16 particular? What effect did it have on you?

17 A Every time I would leave a flight, my clothes
18 would smell, my skin would smell, my hair would smell.

19 Q How about your eyes and your system?

20 A I couldn't wear my contacts because my eyes
21 would be too dry and they would burn.

22 Q Were there times in which you, as a result of
23 the smoking condition that you had requested that the
24 pilots turn on the no smoking sign?

25 A When it would get so much that we could

1 A Yes.

2 Q What happened to airline attendants when you
3 were moving carts -- the jury has heard that type of
4 testimony, when you were pushing carts up and back and
5 serving people, what were you -- what were airline
6 attendants, such as you and others, subjected to in
7 terms of second-hand smoke from the passengers?

8 A Well, if you were serving in a smoking
9 section, it was right in your face a lot of times, and
10 certainly when walking through it, you were just
11 walking through the cloud, especially in the smoking
12 section. It wasn't quite as noticeable in the
13 nonsmoking section, but it was still in the air.

14 Q Would passengers frequently get up and
15 exercise who were smoking and walk through the
16 nonsmoking sections?

17 A Oh, they liked to congregate by the galley.
18 They thought that they could come back there and just
19 have a cigarette and chitchat.

20 Q Was the smoking of passengers such that you
21 were usually or you had on occasion sustained any
22 burns to your clothes or your hands?

23 A I didn't, but a flight attendant that I
24 worked with did.

25 Q Would you frequently see cigarettes in ash

1 almost like not breathe, we would ask them to turn the
2 no smoking section on to clear the air, but it was
3 very, very slow to clear the air and basically
4 negligible.

5 Q When you did request that something be done,
6 it had virtually no effect?

7 A Very little to none.

8 Q Were you advised or did you have the
9 understanding that there was some sort of ventilation
10 system?

11 A Yes.

12 Q Were you able to appreciate, did you notice
13 whether or not the ventilation system on the aircraft
14 improved to any appreciable degree the smoking
15 conditions when the ventilation system was on or off?

16 A I did not.

17 Q Could you see, for example, as a result of
18 the ventilation system, could you see the smoke being
19 drawn anywhere and fresh air being pumped in?

20 A Not at all. Not at all. It was just too big
21 a cloud.

22 Q Could you see the smoke actually just sort
23 of --

24 A It would hover.

25 Q It would hover?

1 trays smoldering?

2 A Oh, absolutely. And I thought that was a
3 safety risk also as well as a health risk.

4 Q You say smoldering, what do you mean by
5 smoldering? I know I used the word.

6 A A lit cigarette sitting there burning with
7 the plume of smoke coming up.

8 Q And of course you could see the smoke coming
9 from the people who were exhaling?

10 A Of course.

11 Q Would you frequently be subjected to smoke
12 being exhaled right directly as you were serving, in
13 your face?

14 A Often times you would ask somebody what they
15 wanted to drink or wanted for dinner and they would
16 exhale as they told you.

17 Q Ms. Jewel, did you frequent -- I am going to
18 ask you whether -- did you notice the type of
19 cigarettes that most people -- well, that the people
20 smoked?

21 A I pretty much saw every American brand that I
22 can think of.

23 Q Did you see, for example, Kool?

24 MR. ENGRAM: Your Honor, I object to leading.
25 If she is asked what brand she saw and she can tell,

1 fine, but to suggest the answer in the question is
 2 leading.
 3 THE COURT: No, I don't think so.
 4 Q Did you see frequently a Kool?
 5 A Yes.
 6 Q Lucky Strike?
 7 A Yes.
 8 Q Pell Mall?
 9 A Yes.
 10 Q Raleigh?
 11 A Yes.
 12 Q Richland?
 13 A Yes.
 14 Q Viceroy?
 15 A Yes.
 16 Q Kent?
 17 A Yes.
 18 Q Newport?
 19 A Yes.
 20 Q Old Gold?
 21 A Yes.
 22 Q The first group is Brown and Williamson. The
 23 second group was Lorillard.
 24 Philip Morris. Marlboro?
 25 A Yes.

1 Q Benson & Hedges?
 2 A Yes.
 3 Q Chesterfield?
 4 A Yes.
 5 Q Virginia Slims?
 6 A Yes.
 7 Q That's Philip Morris.
 8 And R.J. Reynolds: Camels?
 9 THE COURT: There is no objection, but you
 10 can't say what they are.
 11 MR. WEINSTEIN: It is in the record, Judge.
 12 THE COURT: It doesn't matter.
 13 Q R.J. Reynolds: Camels?
 14 A Yes.
 15 Q Doral?
 16 A Yes.
 17 Q Winston?
 18 A Yes.
 19 Q Salem?
 20 A Yes.
 21 Q Virtually all of the American brands that I
 22 have just named; is that correct?
 23 A Yes.
 24 Q Do you know Lynn French?
 25 A I didn't meet her before coming here.

1 MR. WEINSTEIN: Judge, may I have a moment?
 2 THE COURT: You may.
 3 Q Just one last question. I promised to keep
 4 it short and I think I did.
 5 After the ban, tell the jury how -- after the
 6 ban on smoking, after it was finally banned, tell the
 7 jury what the conditions were with regard to smoke on
 8 airlines.
 9 A You are talking about after it has been
 10 banned internationally also?
 11 Q Yes. Yes. Tell how the air conditioning and
 12 the circumstances got better or improved.
 13 Well, was there any smoke, was there any
 14 smoke there after it was banned?
 15 A No. The air felt cleaner, seemed cleaner. I
 16 personally experienced maybe less colds -- definitely
 17 less colds and sinus kind of problems than I had in
 18 the years that I flew in smoke.
 19 Q When there was smoke there, you had off and
 20 on problems with your sinuses?
 21 A Yes.
 22 Q After the ban you didn't have those problems
 23 anymore; isn't that correct?
 24 A Maybe once a year versus ten times.
 25 MR. WEINSTEIN: Thank you very much.

1 THE COURT: Any questions?
 2 MR. ENGRAM: Yes, your Honor.
 3 CROSS-EXAMINATION
 4 BY MR. ENGRAM:
 5 Q Good morning, Ms. Jewel. I am Jonathan
 6 Engram. We met three days ago; is that right?
 7 A Yes, we did.
 8 Q I just want to go over some things about your
 9 work history.
 10 Number one, you never worked as a flight
 11 attendant for TWA, did you?
 12 A I did not.
 13 Q You flew your entire career with American
 14 Airlines?
 15 A Yes, I did. Yes, I do.
 16 Q You did not meet the plaintiff, Lynn French,
 17 sitting next to Mr. Weinstein, until you came here to
 18 Miami this week, correct?
 19 A I met her Monday night.
 20 Q In fact, you did not even know her name until
 21 you came to Miami this week to testify?
 22 A That's correct.
 23 Q You do know, however, the lady seated in the
 24 first row next to Mr. Brown, don't you?
 25 A I'm sorry?

1 Q Lani Blissard?
 2 A Yes, I do.
 3 Q You have known Lani Blissard since the 70's,
 4 correct?
 5 A Correct.
 6 Q In fact, you are good friends with Lani
 7 Blissard?
 8 A True.
 9 Q And it was Ms. Blissard who recommended you
 10 as a witness to Ms. Weinstein, correct?
 11 A Correct.
 12 Q You came all the way from Orcas Island,
 13 Washington to Miami, Florida, correct?
 14 A Correct.
 15 Q That island is almost all the way to Canada,
 16 right?
 17 A That's right.
 18 Q So if you look at a map of the United States,
 19 you came from the northern most tip on the Pacific
 20 Ocean in the continental United States to the
 21 southernmost tip on the Atlantic Ocean on the East
 22 Coast?
 23 A Yes, I did.
 24 Q And you didn't even know her name before you
 25 got here?

1 A I did not.
 2 Q Let's focus on the time you were with
 3 American based in San Diego from 1976 to 1994, okay?
 4 A Okay.
 5 Q You flew on the Boeing 707, the DC-10, the
 6 Boeing 727 and the Boeing 767, didn't you?
 7 A Yes, I did.
 8 Q From that period, during that period of time,
 9 1976 to 1994, when smoking sections were in place, you
 10 did not fly the L-1011 or the Boeing 747, did you?
 11 A I did not.
 12 Q In fact, the plane you preferred to fly when
 13 you were based in San Diego was the 767, correct?
 14 A Correct.
 15 Q And that was because there was never any
 16 smoke on that airplane domestically and because it was
 17 more flight attendant friendly as far as design; is
 18 that correct?
 19 A When you asked me that question in the
 20 deposition, I wasn't thinking years. So when I first
 21 started flying the 767, there was some smoke on it,
 22 but it was a newer airplane and the period I was
 23 thinking about was 1995 to '99 when I was flying trans
 24 cons out of San Francisco that were not smoking.
 25 Q When I asked you the question at page 32 of

1 your deposition or when the question was asked of you
 2 at that time:
 3 "Q. Was there any particular plane you
 4 preferred flying on during your San Diego period?"
 5 Okay, that would be through 1994, correct?
 6 A Correct.
 7 Q You said:
 8 "A. The 767."
 9 "Q. Why?"
 10 "A. There was never any smoke on that
 11 airplane domestically and also because it was a better
 12 plane to -- it was the more flight attendant friendly
 13 airplane as far as design."
 14 A Right.
 15 Q Was that your answer Monday night?
 16 A That was my answer Monday night and when you
 17 said San Diego, I heard San Francisco. That was
 18 somewhat true in San Diego also.
 19 Q You know nothing about airplane ventilation
 20 systems technically, correct?
 21 A I do not. I only know what I experienced.
 22 Q You don't know whether an airplane had a one
 23 pass system or a recirculation system, do you?
 24 A I don't know.
 25 Q Do you know anything about air exchange rates

1 on airplanes?
 2 A Just that they are bad.
 3 Q Again, page 51 of your deposition, Ms. Jewel.
 4 Do you remember the question I asked you and the
 5 answer that you gave, page 51, line 6:
 6 "Q. Do you know anything about the air
 7 exchange rates on any of these airplanes?"
 8 "A. No, I do not."
 9 A That is correct, I do not.
 10 MR. TROP: Your Honor, I believe it is the
 11 same answer.
 12 THE COURT: The jury will consider it.
 13 Q You don't know how many rows were designated
 14 for smoking on the Boeing 727 at any time, do you?
 15 A It would vary.
 16 Q You have no idea about which type of
 17 airplanes Lynn French flew at TWA, do you?
 18 A I do not.
 19 Q You don't know where Ms. French has been
 20 based over the course of her career, do you?
 21 A No.
 22 Q You have no idea what route she flew over the
 23 course of her career, do you?
 24 A No, I don't.
 25 Q You don't have any idea what mix of

1 international or domestic flights she flew, do you?
 2 A I don't.
 3 Q And you have no idea how many smokers were on
 4 any of the flights that she flew, do you?
 5 A I do not.
 6 Q Do you know what position she worked on the
 7 aircraft during the course of her career?
 8 A I do not.
 9 Q Now, on average, how many hours a month did
 10 you fly during this time period, 1976 to 1994?
 11 A 67 to 75.
 12 Q And on average, you would work what, 12, 14
 13 days a month?
 14 A Correct.
 15 Q And you have never worked as a flight
 16 attendant on a flight to or from Hawaii, correct?
 17 A That's correct.
 18 Q You said that the smoke was noticeable,
 19 correct?
 20 A I did.
 21 Q You could see it, you could taste it and you
 22 could smell it, correct?
 23 A That's true.
 24 Q And you said that the two most memorable
 25 things about it were, number one, the way you smelled

1 your hair and your skin and, number two, the way your
 2 clothes smelled when you got off the airplane,
 3 correct?
 4 A That was the most memorable for me because I
 5 didn't like smelling like that.
 6 Q Mr. Weinstein asked you at the end of his
 7 direct examination about sinus problems. You have
 8 never been diagnosed with chronic sinusitis, have you?
 9 A I have not.
 10 Q In fact, during your entire career as a
 11 flight attendant, you saw an ear, nose and throat
 12 doctor only on one occasion when you were based in San
 13 Diego, correct?
 14 A Correct.
 15 Q And he helped you figure out what your sinus
 16 problem was, correct?
 17 A For that specific instance, yes.
 18 Q Yes. And your problem was that you had a
 19 deviated septum in your nose and the ear, nose and
 20 throat doctor wanted to do surgery, correct?
 21 MR. WEINSTEIN: Your Honor, may I -- excuse
 22 me, I will wait.
 23 THE COURT: You may answer.
 24 A That was the ear, nose and throat doctor,
 25 that's what he told me, along with some other things.

1 Q And you never had any sinus surgery to
 2 correct your deviated septum, correct?
 3 A Correct.
 4 MR. ENGRAM: Nothing further.
 5 THE COURT: Redirect?
 6 MR. WEINSTEIN: Yes.
 7 REDIRECT EXAMINATION
 8 BY MR. WEINSTEIN:
 9 Q Ms. Jewel, have you ever flown on any other
 10 airline such as Delta, TWA, et cetera?
 11 A Yes.
 12 Q Was there anything different about the smoky
 13 conditions from airline to airline?
 14 A No. What I was saying to be pretty generic
 15 for what thousands of us experienced.
 16 Q The same?
 17 A The same kind of conditions. I know that
 18 from talking to other airline flight attendants and
 19 from flying on other airlines.
 20 Q When Mr. Engram asked you about your health
 21 conditions, how you were affected, whether your
 22 sinuses were affected, are you aware of the sinus
 23 problems that other airline attendants experienced?
 24 MR. REILLY: Objection.
 25 MR. ENGRAM: Objection.

1 THE COURT: Sustained. Don't answer,
 2 please.
 3 Q Now, counsel also asked you questions about
 4 you coming from across the country?
 5 A Right.
 6 Q Tell the jury why you are here and
 7 testifying.
 8 A I am here to tell the truth of what it was
 9 like back then, the conditions as they were, as I
 10 experienced them, and what I experienced as a result
 11 of being in the smoke; that regardless of what studies
 12 or whatever, I know what I experienced and it was a
 13 condition where I, as a nonsmoker, would come off the
 14 airplane smelling and smelling like smoke, air, skin,
 15 clothes.
 16 Q Ms. Jewel, did you just think it was the
 17 right thing to do?
 18 A It was absolutely the right thing to do.
 19 Q To come here to tell the jury what it was
 20 like?
 21 A Yes. So far I have been lucky and I know
 22 there are thousands that have not been as lucky as I.
 23 MR. REILLY: Objection, your Honor.
 24 THE COURT: Sustained.
 25 MR. WEINSTEIN: I have no further questions.

1 THE COURT: You may be excused.
 2 THE WITNESS: Thank you.
 3 (Witness excused.)
 4 THE COURT: Call your next witness, please.
 5 MR. WEINSTEIN: The next witness is Dr.
 6 Michael Persky.
 7 MR. REILLY: While we are waiting for Dr.
 8 Persky, can we have a short recess?
 9 THE COURT: How does the jury feel, does
 10 anyone need a recess? We have only been going
 11 for an hour.
 12 MR. REILLY: I still would like a short
 13 meeting.
 14 Thereupon,
 15 MICHAEL A. PERSKY, M.D.,
 16 called as a witness by the plaintiff, being first duly
 17 sworn, testified as follows:
 18 (At the side bar.)
 19 MR. REILLY: Your Honor, in spite of the
 20 sustaining of my objection, I think it's
 21 necessary to move for a mistrial at this time.
 22 THE COURT: I will overrule your objection.
 23 I know what you are referring to, it was
 24 gratuitous again. She was just waiting to get
 25 that in.

1 MR. REILLY: That's right.
 2 THE COURT: I don't think it is a basis for
 3 a mistrial, but I understand your point.
 4 I guess that ends the testimony by the
 5 flight attendants except for the plaintiff
 6 herself and I would tell you, plaintiff's
 7 counsel, that you must tell your client that she
 8 is not to volunteer about how thousands of others
 9 are sick.
 10 MR. WEINSTEIN: Judge, most respectfully,
 11 may I say this? When they opened the door --
 12 THE COURT: They didn't open the door and
 13 they didn't ask the question that called for
 14 that, she just gave the answer.
 15 MR. WEINSTEIN: What I am saying is, you
 16 will recall her question to her of well, you
 17 don't have a problem, you never experienced any
 18 kind of sinus or difficulty problem.
 19 I respectfully submit that opened the door
 20 as wide as you can open up a door.
 21 THE COURT: I disagree.
 22 MR. WEINSTEIN: Because the implication is
 23 she didn't have any problem.
 24 THE COURT: That's your opinion. My
 25 opinion is it didn't open any door like that and

1 I am going to ask you to please make sure that
 2 when your client testifies, she doesn't refer to
 3 all of these other people.
 4 Now, during her testimony, if you think
 5 something came up that allows you to ask that,
 6 you approach the bench.
 7 MR. WEINSTEIN: Sure. Certainly. Thank
 8 you.
 9 (Jury present.)
 10 THE COURT: I see everyone has taken a
 11 break. I didn't think we needed a break. We
 12 have to wait for the jurors. I don't want to
 13 take a big break because it takes us so long to
 14 reconvene, so if you don't mind, we will just sit
 15 here and wait for the jurors to come back.
 16 (Pause.)
 17 All right, we will begin.
 18 DIRECT EXAMINATION
 19 BY MR. WEINSTEIN:
 20 Q Doctor, would you please state your name and
 21 your professional address?
 22 A Yes. My name is Michael A. Persky, M.D. My
 23 professional address **DELETED**
 24
 25 Q Doctor, are you a duly licensed practicing

1 physician in the State of California?
 2 A Yes.
 3 Q Doctor, for the benefit of the jury, would
 4 you please give them the benefit of your background
 5 and training?
 6 Let me first ask you this. Are you married?
 7 A Yes. I have been married for it will be 12
 8 years July 28.
 9 Q Do you have any children?
 10 A I have two daughters, aged five and seven.
 11 Q Doctor, would you please tell the jury or
 12 give the jury the benefit of your background and
 13 training in the medical field?
 14 A Yes. I went -- I attended UCLA for my
 15 undergraduate premedical education and went to medical
 16 school in Atlanta, Georgia at Emory University.
 17 I went back to Los Angeles for my residency
 18 training in ear, nose and throat and head and neck
 19 surgery. You may hear the term otolaryngology. I
 20 spent five years at Los Angeles County USC Medical
 21 Center, where I was trained in head and neck surgery
 22 and ear, nose and throat.
 23 I have been in practice in Encino, California
 24 for the past 17 years, since 1985, in private
 25 practice. The first 12 years of my practice I had two

1 associates, Dr. Laurence Pleet and Dr. Walter Deshell.
2 For the past five years I have been in practice for
3 myself.

4 Q Doctor, you mentioned otolaryngology.

5 A Otolaryngology.

6 Q Explain what that involves.

7 A Well, O-T-O means ear and larynx is the
8 throat. And ology is the study of. So it's the study
9 of the ear and throat. It used to be called
10 otorhinolaryngology, rhino being nose, which is ear,
11 nose and throat, but it was shortened for obvious
12 reasons.

13 Q Doctor, are you usually, is your specialty
14 referred to generally as an ENT?

15 A Yes. It encompasses both the medical
16 treatment of ear, nose and throat complaints as well
17 as the surgical treatment of problems that are found
18 in the ears, nose and throat.

19 Q How about the upper respiratory system?

20 Let me ask you this. Doctor, are you Board
21 certified?

22 A Yes, I am.

23 Q What does Board certified mean?

24 A In America, there is a governing board that
25 governs over the Boards of different medical

1 learning to be in the specialty that you are in?

2 A Both doctors and medical students.

3 Q They would be doctors that you instruct that
4 are hoping to achieve the board certification, would
5 that be correct?

6 A Correct.

7 Q Doctor, do you perform surgery?

8 A Yes, I do.

9 Q Does your field, specialty involve the
10 treatment and diagnosis of problems with the sinuses?

11 A Yes, it does.

12 Q Does the sinuses include what is called the
13 upper respiratory tract or system of the human body?

14 A Yes, it does.

15 Q Doctor, we have some diagrams. I would like
16 you to -- do you believe that a diagram of the sinus
17 area will aid you in describing the sinus cavity, will
18 it aid you in describing it to the jury?

19 A I think it will make clearer my explanation
20 to the court and the jury.

21 Q Which diagram do you think will aid you in
22 describing the sinuses?

23 A Having never seen them in this context, I
24 believe that one is probably sufficient.

25 Q Okay.

1 specialties and to become Board certified you have to
2 go through an accredited M.D. training program as well
3 as an accredited residency training program.

4 In otolaryngology, that involves a one year
5 internship and then four years of intensive residency
6 study in the field of otolaryngology.

7 Once you have completed that and have
8 documented enough surgical cases and study hours by
9 your department chairman at the university, you are
10 then eligible to take an examination before the
11 American Board of Otolaryngology.

12 That examination for me took place in 1986 in
13 Chicago. It took place over two days. There is a
14 three-part written examination followed by a full day
15 of oral examination, and based upon your scores on the
16 examination, along with your training, the Board
17 decides whether to issue you your Board certification.

18 Q Are you on the staffs of any hospitals?

19 A Yes, I am. I am on the active staff of
20 Encino Tarzana Medical Center. They have two
21 campuses, one in Encino and one in Tarzana.

22 I am also on staff at LA County USC Medical
23 Center, I am an assistant clinical instructor for
24 medical students and residents.

25 Q So you actually teach doctors who are

1 THE COURT: It's good right where it is and
2 that way I can see it, the jury can see it, the
3 witness can see it and the attorneys can move
4 around if you need to.

5 Can you see it from there? You might face
6 it a little bit more toward the witness.

7 Can the jurors see it?

8 JURORS: Yes.

9 MR. WEINSTEIN: Judge, may I have the
10 witness come down?

11 THE COURT: Of course. You may step down.
12 BY MR. WEINSTEIN:

13 Q Doctor, could you describe, as you look at
14 this diagram, to the jury the sinuses, that is, the
15 sinus anatomy in a typical person?

16 A Okay. The nasal sinuses are air-containing
17 rooms inside of our skulls, particularly our face. We
18 have sinuses over our cheeks called maxillary sinuses,
19 which are illustrated here. They are actually usually
20 the largest sinuses in our heads.

21 Then between our eyes, in this area, the
22 upper part of our nose, there is a group of sinuses
23 called ethmoid sinuses, and they are like little,
24 maybe the size of your fingernail, circular or varied
25 shaped cells, and there may be ten to 20 of these

1 little compartments on each side separated by a very
2 thin little bone.

3 The third set of paired sinuses that we have
4 are directly above our eyebrows. They are called
5 frontal sinuses. They could be fairly large. They
6 could be small. In some people they are not even
7 present.

8 Lastly, there is a deep-seated sinus called
9 the sphenoid sinus, and that is, if you went in the
10 nose straight back, as far back as you can go, to the
11 back of the throat, actually, just in the upper part
12 going back to the back of the throat is where the
13 sphenoid sinus is located.

14 All of these sinuses drain out into the nose,
15 particularly you can see right here the cheek sinuses,
16 the maxillary sinuses drain through the small opening,
17 which is actually in reality often times the size of a
18 ballpoint pen. Sometimes it could be bigger.

19 But the sinuses do drain into this area
20 between these stretchers that you see on the side wall
21 of the nose. These stretchers on the side wall of the
22 nose are called turbinates. There is three turbinates
23 on each side. There is an inferior turbinate, a
24 middle turbinate and a superior turbinate.

25 As far as we are concerned today, the key

1 passages.

2 ••• What cilia do is help move mucus across our
3 respiratory tract passage to remove dirt and dust and
4 smog and pollution and other things that might lodge
5 in our respiratory passages.

6 Q Doctor, based upon your background and
7 training, education, what you have read, are cilia
8 affected by tobacco smoke?

9 A Yes, they are. They are paralyzed by tobacco
10 smoke.

11 Q Generally speaking, are you aware of the
12 constituent or compounds or chemicals that are in
13 tobacco smoke?

14 A I know that there are up to 3- or 4,000
15 different chemical compounds. I am not aware of all
16 of them. Certainly tar and nicotine are the most
17 common, but no, I am not an expert on all of the
18 components in tobacco smoke.

19 Q Do you know the number of chemicals,
20 approximately, that are in tobacco smoke and their
21 effect overall?

22 A I just mentioned 3- to 4,000 different
23 chemicals and certainly many of them have different
24 effects.

25 Q What kind of effects are you talking about?

1 turbinates are the inferior turbinate, we are seeing
2 it on a different angle here, it is a thin piece of
3 bone that comes down surrounded by lining, and above
4 that is the middle turbinate, which again is a thin
5 piece of bone surrounded by lining.

6 Most of the sinuses drain out into the nose
7 between this middle turbinate and inferior turbinate.

8 Q Are there such, this jury has heard some
9 mention of the word cilia.

10 A Yes.

11 Q Tell the jury what that is.

12 A May I sit down?

13 Q Yes.

14 A Before I sit down, I didn't notice this
15 before, but here are the numerous different little
16 cell compartments that I described as being in the
17 ethmoid sinuses between the nose.

18 Q Tell the jury what cilia means, what it is
19 and what their function is.

20 A Certainly in medical school we learn lots of
21 terminology basically translating common words into
22 medical terms.

23 In lay terms, what cilia are little hairs.
24 They are hair cells. They are living cells that
25 actually move on the lining of our respiratory

1 In other words, are there irritants, specifically, are
2 there up to 40 chemicals, chemical irritants of those
3 chemicals that you are aware of?

4 A Yes.

5 Q Based on your background and training, are
6 those 40 other chemicals, can they cause serious
7 illness?

8 A Yes, they certainly can.

9 Q Doctor, we have heard, the jury has heard on
10 opening statement from Mr. Reilly that, well, the
11 sinuses, that air that people breathe in doesn't go to
12 the sinuses because it doesn't move in and out like
13 the lungs. Could you tell the jury whether that's so,
14 what Mr. Reilly said is so or not?

15 MR. REILLY: I object to the form, your
16 Honor.

17 THE COURT: Sustained. Rephrase, please.

18 Q Doctor, does air that people breathe in, is
19 it well known, do you know whether or not air that we
20 breathe in enters the sinuses?

21 A Yes, it does. In fact, our current thoughts
22 on treating sinus disease is to actually open up those
23 small openings of the sinuses to allow air, more air
24 to get in to that lining.

25 We know that the lining of the sinuses, when

1 exposed to air, becomes relatively normal and when the
2 lining of the sinuses are blocked from air, the lining
3 becomes swollen and abnormal. So in you and I, if we
4 have normal sinuses, air is getting in there keeping
5 that lining normal.

6 Certainly having been a specialist in this
7 field for 17 years and being a gentleman who in
8 earlier days enjoyed smoking cigars, I personally am
9 no longer able to smoke cigars because when I do
10 that --

11 MR. REILLY: Objection, your Honor.

12 A I develop --

13 THE COURT: Just one moment.

14 MR. REILLY: Objection, your Honor.

15 THE COURT: Sustained.

16 I'm sorry, I didn't mean to interrupt you.

17 Next question.

18 Q If someone, based on your knowledge,
19 background and training, if somebody smoked a
20 cigarette or cigar, does it enter the sinuses and
21 cause damage?

22 A Yes.

23 Q Tell the jury how and why.

24 A Well, it causes irritation to that small
25 opening into the sinus, preventing air to get in once

1 correct?

2 A Correct.

3 Q Now, Doctor, did you have the occasion to
4 treat Lynn French professionally?

5 A Yes, I did.

6 Q Did you bring your medical records with you?

7 A Yes, I did.

8 Q Were those medical records maintained by you
9 contemporaneously, that is, the records that you have
10 brought with you, were they made at the time that you
11 were treating her and made -- in a manner that is
12 usual and customary for doctors in your specialty?

13 A Yes.

14 Q Doctor, what's the first date that you saw
15 Lynn French?

16 A The first date that Lynn French was in our
17 offices was June 26, 1989, at which time she was seen
18 by my associate, Dr. Laurence Pleet.

19 The first time that I actually saw Mrs.
20 French was on August 9, 1989.

21 Q Doctor, on initially seeing her in your
22 office by you or others, was a history taken?

23 A Yes. A history was taken by my nursing
24 staff.

25 Q Doctor, what is a history?

1 the irritating damaging irritants are in there,
2 causing irritation, swelling, pain, pressure in the
3 head and often times sinusitis.

4 Q On an educational basis, have you ever seen
5 studies, diagrams that illustrate and visualize the
6 flow of air through the nose and into the sinuses?

7 A Yes. There are very well documented
8 videotapes where a small camera has been placed
9 actually through what we call the canine fossa, which
10 is a small area underneath the lip here into the
11 sinus. Through that small hole a blue dye or black
12 particles have been placed into the cheek sinus and a
13 video camera has watched that dye and black
14 particulate matter be pushed out of the sinus up
15 through the natural opening and out into the nose.
16 The rate of that movement has been documented.

17 Q Is it well established in the scientific
18 medical community that air that people breathe in,
19 smoke that people breathe in does indeed enter the
20 sinuses and it causes the damage that you have
21 mentioned?

22 A Yes.

23 Q So if somebody -- somebody, anybody were to
24 state that it doesn't go in because the sinuses don't
25 move in and out, that would not be so; is that

1 A A history of a patient is like other
2 histories. It tries to find out as much information
3 about that patient as possible, particularly as to
4 pertaining to their problems.

5 Q Doctor, how important is it to take a
6 thorough history?

7 A It's very, very, very important. It's the
8 first thing that's taught in medical school and in
9 residency, that before doing any tests, before doing
10 anything to a patient, as a physician you need to talk
11 to the patient and find out about their history.

12 Q In taking a history, is it usual and
13 customary and mandated that you find out what the
14 occupation of a patient is?

15 A Yes.

16 Q Why is that?

17 A Well, there are certain diseases that are
18 related to certain occupations. Certainly people that
19 worked in the asbestos field developed certain forms
20 of cancer. People who work outside in the sunshine
21 are more prone to develop skin cancer. People that
22 inhale certain irritants are more likely to develop
23 certain diseases.

24 Q I want you to assume that Dr. Stammberger,
25 hired by the defendants, has testified that for the

1 last ten years he doesn't even ask the occupation of
2 any of his patients. I want to ask you whether that
3 is usual and customary and does it abide by or conform
4 to the usual standards required of a doctor?

5 MR. REILLY: Objection, your Honor.

6 Mischaracterization of Dr. Stammberger's
7 testimony. I object to the form of the question
8 because it mischaracterizes Dr. Stammberger's
9 testimony.

10 THE COURT: Since I haven't seen this part
11 of the testimony, I am going to have to sustain
12 the objection, unless you show me it. I will
13 sustain the objection at this point.

14 Q Doctor, on the first occasion that you saw
15 Lynn French -- let me ask it this way. What history
16 was initially taken of Lynn French?

17 A Again, are you asking me the first time she
18 was seen in our office or the first time that you I
19 saw her?

20 THE COURT: Are you asking the first time he
21 saw her or the first time she came to the office?

22 MR. WEINSTEIN: I wanted to know what
23 history was taken of her.

24 A The first time she was in our office,
25 actually the first question asked was her age and the

1 She denied any allergies. She denied any bleeding
2 problems and stated that she was a nonsmoker.

3 She said that her hearing was good, she had
4 no dizziness. She had no other pain or nasal
5 discharge other than what was described. She denied
6 nasal obstruction, which is difficulty breathing
7 through the nose.

8 She denied any nasal trauma to her nose. She
9 stated that she had approximately two to three colds
10 per year, with frequent sore throats. She had
11 difficulty swallowing only when she had her sore
12 throats.

13 And then we asked about childhood diseases,
14 such as measles and mumps and rheumatic fever, all of
15 which she denied having. She denied having a history
16 of pneumonia or asthma or hayfever.

17 We asked about past operations. She stated
18 that she had her adenoids and tonsils out as a child
19 and that she had had two C sections and an
20 appendectomy.

21 She stated that -- we usually ask about the
22 patient's general health to see if there is anything
23 else that we might have missed. She said that that
24 was fine and then we asked about the family.

25 Her father was living and well and her mother

1 second question asked was her occupation. She let us
2 know that she was a stewardess.

3 The next thing we asked for was her chief
4 complaint, which is why she is presenting to our
5 office that day.

6 Do you want me to go through?

7 Q Yes, I would like you to give me the history
8 of what her complaints were with how old she was at
9 that time.

10 A She was a 43-year-old stewardess at that
11 time, complaining of sinus infections, post-nasal
12 drip, hoarseness of her voice.

13 She stated that she had seen a Dr. Maday in
14 Woodland Hills and had received antibiotic injections
15 three times, once a day, and also an oral antibiotic
16 called Lincomycin for four days.

17 She complained of pressure and tinnitus,
18 which is ringing, in both of her ears, greenish
19 expectorant or mucus from her sinuses, pressure in
20 both of her cheek areas, in her forehead and behind
21 her ears with terrible headaches. She also complained
22 of a sore throat that had been present for
23 approximately 11 days and possible swollen neck
24 glands.

25 She denied being on any other medications.

1 was also living and well. Her grandmother had a
2 history of cancer. There is no diabetes history in
3 the family. Her grandfather had high blood pressure
4 and there was no history of heart disease or allergies
5 in the family.

6 When I saw her the very first time on August
7 9, 1989, at that time she complained of a sinus
8 infection with cough, stating that her ears felt
9 plugged and she had headaches.

10 She stated that her symptoms had continued
11 since June of 1989, which was approximately two to
12 three months. She complained of frontal headaches
13 with throbbing pain. She stated that she had green
14 phlegm with post-nasal drip and that she reiterated
15 that she had a history of multiple bouts of sinusitis.

16 Q Did you perform a physical examination?

17 A Yes, I did.

18 Q And what did that reveal?

19 A The physical examination of the head and neck
20 entails palpating the neck for any masses or lymph
21 node swelling.

22 Q Palpating means?

23 A Palpating means touching.

24 It then entails taking a look into the oral
25 cavity, the mouth, looking at the tongue and the

1 throat and other structures of the tongue, followed by
2 looking into the nose with a little light and a nasal
3 speculum, which is an instrument that just fits into
4 the nostril and my hand and as my hand presses on the
5 speculum, it opens the nostril so that I can look
6 inside there.

7 I complete the examination then by checking
8 the ears also with a little instrument called an
9 otoscope.

10 Q Doctor, did there come a time when you formed
11 a diagnosis based on your examination at least at that
12 time?

13 A Yes. After having examined Mrs. French and
14 noting that she had some tenderness over her sinuses
15 when I pressed on the skin, as well as swollen
16 bilateral inferior turbinates and given her history
17 along with the physical examination, I made a
18 diagnosis of chronic sinusitis, noting that there was
19 an allergic component and I wanted to rule out or make
20 sure that there weren't other anatomic causes for the
21 chronic sinusitis.

22 Q Is your diagnosis based on a reasonable
23 degree or probability?

24 A Yes.

25 Q Doctor, did you set out a course, did you

1 chronic sinusitis.

2 Explain the difference between each, since
3 you have diagnosed Lynn, Lynn French, as having
4 chronic sinusitis.

5 A Well, if somebody comes in and has never had
6 sinus problems or has not had any sinus problems in
7 the past six months and comes in with sinusitis,
8 that's termed acute sinusitis. It's a sinusitis that
9 just happens.

10 We treat it with antibiotics usually and the
11 antibiotics cure it, or sometimes it's cured on its
12 own without antibiotics. But as long as the sinusitis
13 goes away relatively quickly and doesn't linger on and
14 doesn't recur, that's called acute sinusitis.

15 When sinus infections continually recur over
16 time or last for a long time, over months, then we
17 term that chronic sinusitis.

18 Q Doctor, when was the next time you saw Lynn
19 French?

20 A The next time I saw Mrs. French was September
21 5, 1989, at which time she complained of a sinus
22 infection. I noted that she had been on penicillin
23 and that she continued to have thick, yellow green
24 discharge.

25 Q Were they the complaints she had at that

1 decide what to do to treat her in order to relieve the
2 problems that she was having over some years?

3 A Yes. The standard of care at that time when
4 patients presented with sinusitis, chronic sinusitis,
5 was to treat the patient with a high dose of
6 antibiotics for two or three weeks. So I gave her
7 penicillin, 500 milligrams, four times a day for two
8 weeks.

9 I also gave her a nasal decongestant to try
10 to shrink some of the swollen nasal passages to help
11 both liquid flow out of her sinuses and to allow air
12 to get up into her sinuses.

13 Lastly, I injected a very small amount of a
14 medication called Kenalog, which is a steroid, into
15 the tip, the front tip of her anterior inferior
16 turbinate. The Kenalog, that steroid, helps decrease
17 swelling of swollen tissues.

18 Lastly, I made a note saying that if her
19 symptoms recur, then a CT scan of her paranasal
20 sinuses should be obtained and that she was a possible
21 candidate for endoscopic sinus surgery, again, if her
22 symptoms continued.

23 Q Doctor, you mentioned that your diagnosis was
24 chronic sinusitis. Now, the jury has heard various
25 expressions before, that is, acute sinusitis and

1 time?

2 A Yes.

3 Q What did you do for her on that occasion?

4 A Well, I examined her again and found that her
5 nose was congested, her sinuses, again, when I touched
6 them, were now plus 2 tender. This is on a scale of
7 zero to 4. If there is no tenderness, it's zero. If
8 there is a little bit of tenderness it's 1, maximum
9 pain and tenderness is 4. So this was a 2. So she
10 had moderate pain over her sinuses.

11 Her ears were normal.

12 Again, I assessed her to have chronic
13 sinusitis and I recommended that she have a CT scan of
14 her sinuses and I also gave her a cough syrup, so she
15 must have been complaining of a cough, which is
16 frequent with sinusitis.

17 Q What is a CT scan?

18 A A CT scan, C stands for computed and T stands
19 for tomography. It's a specialized x-ray that
20 actually allows us to see slices of anatomy.

21 Q You were saying, Doctor, about the CT scan?

22 A Yes. It allows us to see slices of anatomy,
23 almost as if you guillotined a cadaver and you
24 actually can see the slice of the anatomy internally.

25 Q When is the next time that you saw her?

1 Let me come along a bit here. How soon
 2 thereafter was a CT scan performed?
 3 A It was scheduled for the following day
 4 actually, September 6.
 5 Q So you did schedule a CT scan to further
 6 investigate Lynn French's problems, correct?
 7 A Yes.
 8 Q Was a CT scan taken?
 9 A Yes, it was.
 10 Q What was that date?
 11 A Let me look for the actual report. The CT
 12 scan was taken on September 6, 1989.
 13 Q As I understand it, those records are not
 14 available of that CT scan, but we do have another CT
 15 scan that was taken later; is that correct?
 16 A That is correct. We do have the written
 17 report from the x-ray doctor, the radiologist.
 18 Q Although we don't have the actual picture of
 19 the CT scan because it either got lost or whatever,
 20 there is a report that was made contemporaneously when
 21 a radiologist read it; is that correct?
 22 A Yes.
 23 Q What did that CT scan show?
 24 A To read from the report, it says that "There
 25 are large air fluid levels seen in the maxillary

1 A I believe I discussed the findings with Mrs.
 2 French and it was decided -- I believe that she had
 3 felt that she had had enough with the sinus infections
 4 and wanted to alter the course and frequency of having
 5 so many infections and I recommended, based on her
 6 history, her physical examination and her x-ray
 7 findings, that functional endoscopic sinus surgery
 8 would likely help her.
 9 Q At that time, your office practice had to do
 10 with treating patients for sinusitis and surgery of
 11 same?
 12 A Yes. As a practicing otolaryngologist, the
 13 majority of my patients seen were either for sinus,
 14 throat or nose problems.
 15 Q I don't know if we have asked you this
 16 question before, but could you give the jury a general
 17 estimate of the number of patients over the years that
 18 you have seen, diagnosed and treated for upper
 19 respiratory sinus problems and problems in that area?
 20 A I have been in practice for 17 years. At the
 21 point that I had seen Mrs. French, I had been in
 22 practice for four years. I work Monday through Friday
 23 and see approximately 20 to 25 patients a day and
 24 approximately five to ten of those patients each day
 25 were sinusitis patients.

1 antra," antra being the cavity, the cheek sinus that
 2 we looked at on the diagram. "Small air fluid levels
 3 are seen in the ethmoid sinuses."
 4 For the benefit of the jury, air fluid level
 5 just means that a sinus that normally just has air in
 6 it now has something else in it, fluid or discharge.
 7 "No air fluid levels are identified in the frontal
 8 sinuses or the sphenoid sinuses," the frontal sinuses
 9 being the ones above our eyebrows, the sphenoid
 10 sinuses being the ones all the way at the back of the
 11 nose, the back of the throat.
 12 Q I put this back up here so the jury could
 13 refer to it as you are speaking.
 14 A "No definite retention cysts are seen. No
 15 thinning or ballooning sequestra or bone destruction
 16 is seen."
 17 "The impression: Findings consistent with
 18 sinusitis."
 19 Q So the radiologist also found sinusitis based
 20 on the CT scan; is that correct?
 21 A Yes, based on the x-ray findings.
 22 Q Did you receive this report in the usual
 23 course of your office practice?
 24 A Yes.
 25 Q As a result of that, what did you do?

1 So that could be anywhere from 20 to 40 a
 2 week for many years.
 3 Q Therefore, based on that, you considered
 4 yourself a person very closely associated with the
 5 diagnosis and treatment of sinusitis and it's causes;
 6 is that correct?
 7 A Yes. Additionally, coming out of my
 8 residency program, the chairman of our department was
 9 a Dr. Dale Rice, who was one of the -- he was at the
 10 forefront of the development of endoscopic sinus
 11 surgery. He has written textbooks on it. So in the
 12 course of our residency program, we spent a lot of
 13 time both diagnosing and treating sinusitis patients
 14 with Dr. Rice.
 15 Q If you know, approximately how many ENT, how
 16 many ear, nose and throat doctors are there in the
 17 United States?
 18 A I believe there are approximately 7- to 9,000
 19 otolaryngologists in the United States.
 20 Q The United States itself, in terms of their
 21 doctors, is it at the forefront throughout the world;
 22 they have doctors who are specialists and write and
 23 are considered in the forefront of treating these type
 24 of diseases?
 25 A Yes.

1 Q Doctor, what did you do, what was the final
2 result of your conversation and meeting with Lynn
3 French in terms of surgery?
4 A Well, surgery was scheduled for September 20,
5 1989 and performed on that day.
6 Q Tell the jury what that surgery consisted of
7 and where it was done and just bring us on down as to
8 what's involved with where and how the surgery was
9 performed.
10 A The surgery was done at Tarzana Medical
11 Center. I believe Mrs. French arrived at the hospital
12 the morning of the surgery. She was taken to the
13 operating room. She underwent general anesthesia.
14 Once she was asleep, we further anesthetized
15 the nose with lidocaine and epinephrin. The
16 epinephrin cuts down on bleeding.
17 Once that's all done and her face is washed
18 and towed off, approximately ten to 15 minutes have
19 passed and at that point we begin the surgery by first
20 looking, again with a nasal speculum and a headlight,
21 into her nose.
22 Q Doctor, you mentioned she underwent general
23 surgery and you put her to sleep; is that right?
24 A Yes.
25 Q So she is not awake during this time

1 we can run out of gas, certainly we can end up in an
2 accident and die. I don't expect any of those things
3 to happen, yet the risk is there and it's real.
4 Q After you advised her that there was a risk
5 to general anesthesia, her decision was still to go
6 ahead with the surgery, correct?
7 A Yes.
8 Q Now you can continue.
9 A Once the inside of the nose is looked at by
10 eyeballing it, we then use endoscopes, which are small
11 rigid telescopes. They have a light source so that
12 when I place the endoscope into the patient's nose
13 cavity, it lights up the inside and we can actually
14 see very well the anatomy.
15 Each side of the nose is then treated
16 depending upon what the pathology in that nose is, and
17 our goal of the surgery is to open up that small
18 passageway that we looked at on the diagram before so
19 that it goes from the size of a ballpoint pen head to
20 perhaps the size of our thumbnail, a half-inch by a
21 half-inch, maybe even sometimes bigger.
22 In doing that, we expose the cavities of the
23 sinuses and take out any other disease that might be
24 there, any fluid, mucus, polyps. Sometimes we are
25 surprised, there could be other things there as well,

1 obviously?
2 A Correct. An anesthesiologist has started an
3 IV in her hand, given her medication through the IV
4 that let her go to sleep and when she is asleep, an
5 endotracheal tube, a breathing tube is placed through
6 her vocal -- through her mouth, down through her vocal
7 cords to allow her to breathe on a ventilator.
8 Q Are there known risks to general surgery --
9 excuse me, to general anesthesia and did you advise
10 Lynn French of it?
11 A Yes. Certainly there are risks to general
12 anesthesia. As part of the preoperative informed
13 consent, all patients are told about the risks of
14 anesthesia and of the operation.
15 Q What is the ultimate risk that she is advised
16 of?
17 A Well, what I tell patients is that there is a
18 risk to receiving the anesthesia. People can have
19 reactions to the drugs. Certainly there is a very,
20 very rare chance of reaction to the drug.
21 The ultimate risk is the patient not waking
22 up. The way I -- the way that I present this to the
23 patient is to say that there is risks in everything we
24 do. We certainly get in our cars, drive on the
25 freeway. There is a risk that we can get a flat tire,

1 tumors, fungus.
2 Once that's accomplished, the surgery is
3 continued back into the ethmoid sinuses, which are the
4 sinuses that are between the eyes and the nose, and
5 those little cells are opened up as much as possible
6 to allow them, one, to drain into the nose, and again
7 to allow air to be in contact with the lining.
8 Once we get to a point where it appears that
9 the lining in those cells are normal and there is no
10 further disease, basically the operation is over at
11 that point, unless there is something specifically
12 that we see on the CAT scan that tells us to go to
13 another area.
14 Q How did Lynn French -- did she survive, so to
15 speak, the surgery and what was the outcome of the
16 surgery?
17 A Well, when the surgery was through, we
18 usually placed a little packing in the area that's
19 been operated on. It's about a 1 by 2 inch little
20 sponge with a string attached. That goes into the
21 area where the sinus has been opened.
22 She was then reversed from the general
23 anesthesia. She tolerated the procedure very well and
24 I believe she had a pretty stable and normal
25 post-operative course.

1 Q Could you tell the jury how she proceeded
2 from there, her chronic sinusitis?

3 A Well, I saw her post-operatively in the first
4 two weeks of October and things were going relatively
5 well.

6 Do you want me to go through each occurrence
7 of seeing her in the office or to give you a general
8 idea?

9 Q You saw her a lot of times, didn't you,
10 Doctor?

11 A Yes.

12 Q Maybe you can move along in a summary fashion
13 explaining, without going through -- tell the jury
14 physically your notes and reflecting the times you saw
15 her, just sort of flick through it.

16 A It is probably about ten pages or more of
17 notes of her being in the office, and also there were
18 frequent telephone calls as well. After a while, Mrs.
19 French became very good at almost diagnosing her
20 symptoms herself, and certainly from seeing her
21 multiple times, if she called and said she had green
22 discharge and headaches and felt that she had
23 sinusitis, I would occasionally prescribe medications
24 over the telephone.

25 I think in general, the incidence of her

1 chronic sinusitis is per

2 A Well, to this poi
3 can't predict the future.

4 Q Based on reason
5 you have an opinion a
6 will continue from tim
7 chronic sinusitis sym

8 A It looks that w.

9 Q Would you say it's more likely than not?

10 MR. REILLY: Objection, your Honor. It's not
11 the standard.

12 THE COURT: It's not the standard?

13 MR. REILLY: He already asked him the
14 question, which is the standard, reasonable
15 medical probability, which is fine, he answered
16 the question. I have no objection to that.

17 THE COURT: I think it's the same standard
18 that we are talking about. You can include
19 reasonable and medical probability.

20 Q Within reasonable medical probability,
21 Doctor, would you have an opinion as to whether, more
22 likely than not, Lynn French will continue to have
23 sinus problems hereinafter during her life?

24 A Yes.

25 Q And that opinion is she will more than likely

1 infections decreased after the surgery than from
2 before the surgery. There were periods where we
3 didn't see her for a year or six months.

4 Q Would you tell the jury actually
5 approximately or pretty close to the number of times
6 that -- aside from the phone calls that you received,
7 the number of times that you actually saw Lynn French,
8 that is, that she was in your office seeking help for
9 her chronic sinusitis?

10 A Up until the present time, approximately 15
11 times.

12 Q For the benefit of the jury, would you
13 summarize, in a general way, those visits, what you
14 saw her for rather than all the notes that you made
15 throughout those 15 times?

16 A Again, in general, she usually complained
17 with pressure and headaches and discharge from her
18 nose and just generally felt awful and was treated
19 with antibiotics.

20 Q Doctor, is that usual and customary for
21 persons who have chronic sinusitis as compared to
22 acute sinusitis?

23 A By definition, I would classify Mrs. French
24 as a chronic sinusitis patient.

25 Q Does that mean that her condition of having

1 have problems for the rest of her life?

2 A Yes.

3 Q Doctor, during the course of your treatment,
4 was a CAT scan taken?

5 A Yes.

6 Q When was that CAT scan taken?

7 A Approximately in August of 1995.

8 Q Have --

9 A May I add, it was August 31, 1995.

10 THE COURT: What is it you are looking for?

11 MR. WEINSTEIN: The actual film.

12 THE COURT: Do you have that?

13 THE WITNESS: I believe I placed it back in
14 the radiograph file. It was a manila file.

15 Q Doctor, I will show you this exhibit, which I
16 guess I have to identify it, Defendant's Exhibit --

17 THE COURT: Has it been marked?

18 THE CLERK: Yes.

19 THE COURT: Has it been marked in evidence or
20 just for ID?

21 THE CLERK: It is Defendant's Exhibit 2021
22 Composite for Philip Morris and Lorillard
23 Tobacco.

24 THE COURT: Is it a defendant's exhibit?

25 THE CLERK: Yes, it is.

1 MR. REILLY: Yes, it is, your Honor.
 2 Q Doctor, I am going to place these CAT scans
 3 on this box and I will show you a blowup of these
 4 shortly. Maybe if you can explain how they are done
 5 and what it looks like.
 6 A Again, what they have done here is --
 7 THE COURT: Can the jury see this?
 8 There is a blowup you will be able to
 9 see later, but does the shadow box move out from
 10 the wall at all?
 11 THE WITNESS: No.
 12 A The first picture shows dotted lines through
 13 the side of a skull and basically what they have done
 14 here is taken slices, multiple slices going from the
 15 front to the back through the head. The way I explain
 16 this is it's like taking a loaf of bread and slicing
 17 it from the front to the back and then taking that
 18 front piece and flipping it around so we can see it
 19 and then we take the second piece, flip it around so
 20 we can see it.
 21 So the very front piece here, you can see
 22 Mrs. French's front teeth and the little nasal bones
 23 and just the beginning of her forehead.
 24 On CT scans, air shows up as black and bone
 25 shows up as white, as well as other solid structures,

1 almost no gray. There is one small area of gray here
 2 on the left.
 3 Again, we look at the turbinates, which are
 4 those structures that we looked at that come off the
 5 side wall of the nose. There are thin pieces of bone.
 6 You can see a little bit of white surrounded by
 7 swollen gray tissue.
 8 The middle turbinate here significantly is
 9 not just a thin piece of bone surrounded by lining,
 10 but it has a little shell that's now ballooned out and
 11 there is air within the middle turbinate and that
 12 structure, when the middle turbinate has air in it, is
 13 called a concha bullosa, like a conch shell, and
 14 bullosa is like a ball. So that was noted on her CAT
 15 scan.
 16 As we again go further from front to back, we
 17 now see the area where her cheek sinus was opened to
 18 allow more air to get in and allow fluid to come out.
 19 On this side you could see there is a little
 20 bony area. On this side it's empty or not there.
 21 On different cuts, on different areas of the
 22 CT scan it's also open on her right side.
 23 Again, looking at her cheek sinuses, there is
 24 very little fluid in the sinuses. When we described
 25 an air fluid level earlier in the sinus, you would see

1 such as teeth. Soft tissues, like cheeks or fluid,
 2 show up gray.
 3 So as we go from front to back, you see
 4 various areas of black air in the sinuses, black on
 5 the x-rays, not really black air. You see gray areas
 6 where, say, the eyeballs are, the inferior turbinates
 7 are down here, the nasal septum, which is the center
 8 divider between our nose is the structure that runs
 9 right down the center in these pictures and then the
 10 brain is above here.
 11 Q What do they reveal, if anything, that's
 12 significant for the jurors to appreciate?
 13 A Well, again, when I look -- this CAT scan
 14 from 1995 was after Mrs. French's surgery, so what I
 15 look -- the reason I got this was to see whether or
 16 not there was something blocking her outflow tract
 17 from her sinuses or whether there was disease in those
 18 sinuses that was causing, again, recurrent infections.
 19 So the first area I look at is in the frontal
 20 sinuses, the sinuses above the forehead, and there is
 21 lots of black areas, lots of air with very little or
 22 no gray. So I know that her frontal sinuses are fine.
 23 As we go again from front to back, we see the
 24 ethmoid sinuses that are between the eyes and the
 25 nose, and again there is lots of black areas with

1 maybe up to this level gray and above it air or black.
 2 Q Doctor, we have blown up some CT scans that
 3 are there.
 4 A Okay.
 5 Q Would you tell me which ones would
 6 illustrate, if any, what you are pointing out so we
 7 have larger ones?
 8 A The one in your right hand is probably
 9 sufficient.
 10 Q Maybe it's larger, so if you can come down
 11 here. There are actually three multiple -- there are
 12 many sections that are revealed on the actual film, is
 13 that right, doctor?
 14 A Yes. This captures one section and on this
 15 section we don't see -- this is either in front of or
 16 behind the area where this bone was removed. So she
 17 has a hole from this sinus into her nose either in
 18 front of this or behind this, but right here you can
 19 see there is bone completing the nasal wall of that
 20 sinus.
 21 Again, the sinus pushes things up into this
 22 natural opening where the small hole was, up into
 23 here, and it drains into the nose.
 24 What we see here is some gray thickening
 25 mucus or lining in the floor of her left maxillary or

1 cheek sinus and this could represent chronically
2 inflamed tissue or mucus. You can't tell really the
3 difference, although if it was truly secretions and
4 mucus, we would probably have a straight air fluid
5 level there.

6 The middle turbinate in this picture is right
7 here, and again at this level of the cut, we don't see
8 the air cell within it that creates what we term the
9 concha bullosa.

10 There is a small amount of thickening in the
11 bottom of her right cheek sinus as well.

12 Significantly, the sinuses, the ethmoid
13 sinuses are very close to the eyeballs and the brain,
14 and there is very thin bone that separates those two.

15 So again, as part of the informed consent
16 prior to surgery, it's important for the surgeon or
17 myself to inform the patient that there is risk to
18 their vision as well as they could have leakage of
19 fluid from the brain as a complication of the surgery.

20 Q After you reviewed the CT scans, what course
21 of treatment did you continue, if any, when Lynn
22 French came to seek your help?

23 A Well, I noted on the chart that there was
24 thickening of the lining of the left inferior
25 maxillary sinus. We decided at that point to continue

1 her to come back for the steroid shot and she came in
2 and had that.

3 After that, I didn't see her again -- so I
4 saw her November 3, 1995, I gave her a steroid shot
5 and treated her with some antibiotics and then did not
6 see her again until July of 1997. So that was
7 approximately a year and a half.

8 Q What history did you take then when you saw
9 her about any problems that she was having?

10 A On July 11, 1997, she complained again of
11 pressure, pain over her left cheek, her left eye and
12 her ears again were plugged.

13 On physical examination, she had slight
14 crusting or dried mucus in the left nostril. I
15 diagnosed her with sinusitis and again treated her
16 with an antibiotic and decongestant.

17 Q Did she give you, to the best of your
18 recollection, a history of having off and on problems
19 throughout?

20 A Yes.

21 Q And then the next time you saw her, Doctor?

22 A Well, again, then there was a grouping of
23 telephone calls between August '97 and September '97
24 where three courses of antibiotics were given.

25 Another antibiotic was given in March of '98, again in

1 treating her with antibiotics as well as nasal steroid
2 sprays, which help to decrease the swelling of the
3 tissues.

4 Q When was the next time that you saw Lynn
5 French after that?

6 A October 7 of -- I'm sorry, one second.
7 Strike that. I saw her September 6, 1995, and at that
8 time she stated that she was improved, there was
9 decreased discharge in her nose, but she still
10 complained that her ears were clogged.

11 At that time her left cheek sinus opening and
12 her right cheek sinus opening, which are called the
13 ostiomeatal unit areas were both found to be open on
14 examination and there was no discharge noted from
15 those areas.

16 Q And the next time? I realize there may have
17 been -- there were probably telephone calls and such,
18 Doctor?

19 A Yes. There were telephone calls in
20 September, a week later in September for an
21 antibiotic, in October for an antibiotic, a week later
22 in November, at which time she was told to come back
23 to the office for a steroid shot; two weeks later
24 another antibiotic was given and -- so that was
25 mid-November -- I'm sorry. In November of '95 I told

1 April of '98 and November of '98, then again January
2 of '99, all of these being over the telephone.

3 In April of '99, again she had an antibiotic
4 prescribed and then it was not until September of '99
5 that she had her next antibiotics prescribed.

6 I saw her again October 7, 1999, again
7 presenting with left-sided sinus pressure and
8 headaches. At that time her sinuses on the left side
9 were plus 2 tender, her nose appeared clear. I
10 assessed her to have chronic sinusitis and treated her
11 with another antibiotic.

12 Q Doctor, chronic sinusitis is a serious
13 illness, isn't it, Doctor?

14 A Well, it certainly is for the people that
15 suffer from it.

16 Q Doctor, would you continue now on the course
17 of her treatment?

18 A Yes. Once again, there were telephone
19 antibiotics prescribed October of '99, November of
20 '99, December of '99, January of 2000, May of 2000,
21 August of 2000, September of 2000 and October of 2000.

22 Then in 2001, in March and April she was
23 given antibiotics and again given antibiotics in
24 October of 2001.

25 The last time she received antibiotics in

1 2001 was in December and that's been up until March of
2 2002. That was the last time that she received
3 antibiotics.

4 Q Did you see her at that time or was it on the
5 phone?

6 A All of these occurrences were on the phone.

7 The last time I saw her in the office for an infection
8 was it appears October of '99.

9 Q Did Lynn French see anybody else, at least as
10 far as your records are concerned, anybody else in the
11 office?

12 A No.

13 Q Doctor, during this period, obviously up
14 until March of this year, she was obviously still
15 receiving medication for her problems; is that
16 correct?

17 A Correct.

18 Q Doctor, throughout these years, was Lynn
19 French cooperative with you?

20 A Yes.

21 Q Did she appear to have a genuine desire to
22 get better?

23 A Yes.

24 Q Did she ever deviate and not follow your
25 instructions?

1 your records about the cause, so I am just wondering,
2 did you ever make a determination up until the time
3 that you were asked about connecting tobacco smoke,
4 second-hand smoke?

5 A Certainly early, from the earliest times of
6 her visits, we always discussed her occupation as a
7 stewardess and the fact that she was exposed to
8 airline cabins with pressure, pressurization problems,
9 as well as exposure to lots of people in a closed
10 quarters situation, as well as exposure to cigarette
11 smoke.

12 Q Doctor, originally you talked about the
13 effect of tobacco smoke on the cilia?

14 A Correct.

15 Q I really want to ask you about whether or not
16 you have an opinion, based upon reasonable medical
17 probability, as to whether or not you have an opinion
18 as to whether or not the cilia in Ms. French's body
19 was affected and permanently affected which gave rise
20 to the chronic sinusitis?

21 A Well, I do believe that her cilia of her
22 upper respiratory tract were affected by the
23 environmental tobacco smoke that she was exposed to in
24 airline cabins. Whether or not it is a permanent
25 effect, most likely it is not, but I think that she

1 A Not that I know of.

2 Q Tell the jury the type of person that she was
3 in terms of when you saw her in expressing her desire
4 to get better.

5 A Well, like all patients, she wanted to not
6 suffer from recurrent infections, she wanted to feel
7 better. It was affecting her life both at home and at
8 work, and certainly she didn't want to be on
9 antibiotics all the time.

10 Q Otherwise, other than that, did she try to be
11 cordial and pleasant to you?

12 A Yes. She has always been a very pleasant
13 patient. The staff has always liked her very much.

14 Q Doctor, in terms of your goal, your
15 objective, was your primary objective to treat her?

16 A Well --

17 Q Cure her, obviously, possibly?

18 A Yes.

19 Q The reason why I asked that question, because
20 really, were you that interested, so to speak, in that
21 time of specifically determining what would be the
22 more likely cause of the chronic sinusitis sustained
23 by Ms. French?

24 A I'm sorry, I don't understand the question.

25 Q Well, I didn't see -- there is nothing in

1 would need a biopsy of those cilia to find out what's
2 going on currently.

3 Q Doctor, I would like you to ask you various
4 questions and I would like you -- I am going to ask
5 you a hypothetical question concerning facts that the
6 jury will hear from her and have heard some of it from
7 other flight attendants. I am going to ask you a
8 question at the end.

9 Doctor, I want you to assume the following
10 facts, that is facts that the jury will hear either by
11 testimony or by either the plaintiff or by other
12 witnesses.

13 I want you to assume that Lynn French is a
14 nonsmoker; that she has never smoked a cigarette in
15 her entire life: that she has always chosen, when she
16 has been given a choice, such as in a restaurant, to
17 sit in a nonsmoking section.

18 I want you to assume that in 1976, some 26 or
19 27 years ago, she went to work as a flight attendant
20 for TWA Airlines. I want you to also assume that this
21 has been her only career in her life.

22 I want you to assume that she was a healthy,
23 athletic individual prior to being exposed to
24 cigarette smoke in a contained environment of an
25 airline cabin.

1 I want you to assume that a couple of years
2 after being continually exposed to the environment of
3 cigarette smoke in the contained environment of the
4 airplane, Lynn French began to suffer from respiratory
5 problems, especially in her sinuses; that throughout
6 her career Lynn French worked mostly in the coach
7 section of the airplane, which had a number of seats,
8 well over 100, at times designated for smokers, such
9 as the 727, 747 and the L-1011.

10 I want you to assume that the passengers were
11 spewing out smoke in her face when smoking was allowed
12 on airplanes; that flight attendants, including Lynn
13 French, suffered headaches, stuffed noses, aching
14 lungs, burning eyes and coughing after every flight
15 where there was smoking, indicating the degree of
16 smoke that they were subjected to, and that the
17 smoking was permitted on all domestic airlines until
18 1988, when it was banned on only flights of two hours
19 or less, and in 1990, when it was banned on all
20 domestic flights, and that until 1996 you could still
21 smoke on TWA's international flights.

22 I want you to assume that regardless of the
23 ventilation systems on the aircraft, the smoke would
24 never completely clear up or out of the cabin
25 throughout the entire flight, even if the captain

1 turned off the no smoking sign -- turned on the no
2 smoking sign, which occurred at times because of the
3 degree and duration of smoke that was in the
4 compartment.

5 I want you to assume that the smoke permeated
6 the air throughout the entire cabin of the airplane
7 and was more concentrated in the coach part of the
8 cabin where Lynn French usually worked; that usually
9 you could actually see the smoke and the smoke would
10 become infused in the seats, blankets, pillows and
11 would leave stains on -- in certain parts of the
12 aircraft and the interior walls; that the smell would
13 penetrate the clothes and hair of the flight
14 attendants and passengers and would even permeate the
15 interior and contents of closed suitcases.

16 I want you to further assume that the
17 passengers would complain about the intensity of smoke
18 and irritation, respiratory problems it caused.

19 I want you to further assume that there has
20 been testimony or will be testimony from Julius
21 Richmond, the former Surgeon General, concerning the
22 fact that breathing second-hand smoke in airline
23 cabins causes respiratory diseases in nonsmoking
24 flight attendants.

25 I want you to also assume that the jury has

1 already heard from David Burns, who served as the
2 editor of the 1986 Surgeon General's report --

3 MR. REILLY: Objection, your Honor.

4 THE COURT: That part?

5 MR. REILLY: Yes.

6 THE COURT: Overruled.

7 Q That David Burns, who has served as editor of
8 the 1986 U.S. Surgeon General's report, testified in a
9 case that, this trial, by video deposition, that
10 exposure to second-hand tobacco smoke in airline
11 cabins causes respiratory and pulmonary diseases,
12 disorders, including sinus diseases.

13 I want you to further assume that Lynn French
14 flew an average of 70 to 90 hours or approximate 80
15 hours overall per month for approximately 26 years,
16 with the exception of a few months to be at home with
17 her children on two occasions and a few weeks off for
18 a hysterectomy and days off for illness.

19 Also I wanted you to assume that Lynn French
20 has been exposed to cigarette smoke on airlines for
21 thousands and thousands of hours, somewhere between an
22 estimated 10- to 15,000 total hours; that in 1976, for
23 a time she flew two international flights per week
24 from New York to Frankfurt, Madrid, Rome, Athens,
25 Paris, Cairo, London, and that these flights were

1 usually on 747's or L-1011's and were from eight to
2 ten hours of duration on the average, and to assume
3 that dozens and dozens of people would be smoking
4 simultaneously on any given flight.

5 I wanted you to further assume that from 1976
6 to 1984, Lynn French's domestic flights were usually
7 transcontinental, that is, from New York to LA, New
8 York to San Francisco, nonstop; that in 1984, Lynn
9 French had about 16 trips from LA to London, each
10 flight approximately 10 to 12 hours; that from 1986 to
11 1988, Lynn French flew a mix of domestic and
12 international flights, the international flights
13 usually to London and Paris from Los Angeles, a
14 minimum of ten hours on the plane each way.

15 I want you to assume that the smoking was
16 permitted on international flights for the entire
17 flight from ten to 15 minutes before takeoff, ten to
18 15 minutes before landing, and that while working as a
19 flight attendant, walking briskly throughout the cabin
20 serving passengers, Lynn French's respiration rate was
21 higher than that of the sedentary passengers, and that
22 as a result, she was inhaling more smoke, that is more
23 frequently.

24 I want you to assume that there has been no
25 seasonal component to Lynn French's symptoms and that

1 she has had no prior history of any allergies before
 2 becoming an airline employee.
 3 Doctor, with these assumptions I have asked
 4 you to assume, in your opinion, based on reasonable
 5 medical probability, based on your background in being
 6 a specialist in the area that you have designated and
 7 testified to, was the exposure to cigarette smoke,
 8 second-hand smoke on board the aircraft more likely
 9 than not the substantial cause or substantial
 10 contributing cause or factor of Ms. French's chronic
 11 sinusitis which you have diagnosed?
 12 MR. REILLY: I object to the form, your
 13 Honor.
 14 THE COURT: Could you just approach the
 15 bench for just a minute?
 16 (At the side bar.)
 17 THE COURT: What part do you object to?
 18 MR. REILLY: Well, actually, your Honor,
 19 there are several parts I object to. The part I
 20 objected to when I made my first objection was --
 21 THE COURT: That's Burns?
 22 MR. REILLY: Yes. It's not permissible to
 23 ask this witness to rely on testimony of another
 24 witness.
 25 THE COURT: He wasn't asking him to rely on

1 What else about the form of this question?
 2 MR. REILLY: Those are my two principal
 3 objections to the form of this question, your
 4 Honor.
 5 THE COURT: I am going to overrule them.
 6 (Jury present.)
 7 THE COURT: Do you remember all of that so
 8 you can answer?
 9 THE WITNESS: Can I have him repeat the
 10 question, please?
 11 Yes, I do.
 12 THE COURT: Go ahead.
 13 Q I am asking you to answer the question I
 14 asked and I am not going to read it again.
 15 A Yes, I do believe that her exposure to --
 16 Q No, the first thing I asked you was do you
 17 have an opinion?
 18 A Yes.
 19 Q What is that opinion?
 20 A That her exposure to the environmental
 21 tobacco smoke in airline cabins did contribute to her
 22 chronic sinusitis.
 23 Q Was it a substantially contributing cause of
 24 her sinusitis?
 25 A Likely the most --

1 it, he just said assume. It is all hypothetical,
 2 assume this, that and the other thing.
 3 MR. REILLY: Sure. He asked him to rely on
 4 the testimony of Dr. Burns.
 5 THE COURT: No, he asked him to assume it.
 6 Assume it. Assume that there is testimony that
 7 says such and such. That's what I understand.
 8 MR. REILLY: What's the purpose of asking
 9 him to assume it unless you are asking him to
 10 rely on it? I mean, why is it in the
 11 hypothetical? That's number one.
 12 Number two is he once again violated the
 13 admonition of your Honor, the ruling of your
 14 Honor not to make reference to claims or injuries
 15 by other flight attendants.
 16 THE COURT: Only barely did he do that. He
 17 did at some point, but that was not a big part of
 18 it.
 19 MR. REILLY: You can only be a little
 20 pregnant I suppose.
 21 THE COURT: That's not an objection to the
 22 form of this hypothetical question, that's
 23 another type of objection, and I agree, at one
 24 point he said something about it, but it was
 25 pretty minor.

1 MR. REILLY: Objection, your Honor.
 2 THE COURT: Pardon me?
 3 MR. REILLY: Objection. Repetitious. It is
 4 asked and answered.
 5 THE COURT: Overruled. You may answer.
 6 A Likely the most contributing cause to her
 7 chronic sinusitis.
 8 Q More than likely?
 9 A Yes.
 10 Q Now, Doctor, you may recall, I talked about
 11 the respiration rate. What is the normal respiration
 12 rate of a person; in other words, how many times do
 13 they breathe in and out per minute?
 14 A A number between 12 and 20 times per minute.
 15 Q The average person will breathe in and out
 16 between 12 and 20 times every minute?
 17 A Yes, depending upon when somebody is doing
 18 yoga it is going to be on the low side and when
 19 somebody is --
 20 Q That's my point.
 21 A -- exercising, it's going to be higher.
 22 Q If somebody is sitting in an airline seat,
 23 not doing anything but maybe reading, you know,
 24 working your mind more, it would be somewhere between
 25 12 and 20?

1 A Probably on the lower side of that.
 2 Q How about somebody who is working, like Lynn
 3 French and all the other airline candidates, would
 4 expending energy such as pulling carts and going to
 5 the galley, that is, where they have their food and
 6 coffee and such, and walking through the smoke and
 7 whatever, does the respiration rate of a person --
 8 this is so simple and elementary I shouldn't be
 9 asking, but does the respiration rate, that is, does a
 10 person breathe in and out more times than a person who
 11 is just sitting in sort of a sedentary position?
 12 A Again, depending upon the degree of exercise
 13 and work, your respiration rate goes up.
 14 Q Does a person breathe deeper in order to
 15 breathe in more -- well, breathe in more air,
 16 hopefully good clean air and oxygen, when a person is
 17 working?
 18 A It depends on the individual and their state
 19 of anxiety or relaxation.
 20 Q Now, Doctor, in your opinion, based upon
 21 reasonable medical probability, can her condition of
 22 sinusitis lead to any other diseases within reasonable
 23 medical probability?
 24 MR. REILLY: Objection, your Honor.
 25 THE COURT: I will tell you what, this would

1 was qualified to answer.
 2 THE COURT: No, I want the witness to answer
 3 the question on a proffer and then I will excuse
 4 him and we will hear further objection.
 5 MR. WEINSTEIN: I apologize. I probably
 6 should have approached the bench and said based
 7 on what your ruling was.
 8 THE COURT: That's all right.
 9 Do you understand the question?
 10 Do you want it repeated?
 11 THE WITNESS: Yes.
 12 BY MR. WEINSTEIN:
 13 Q Doctor, do you have an opinion, based on
 14 reasonable medical probability, as to whether or not
 15 Ms. French's chronic sinusitis can lead to any other
 16 disease?
 17 A Yes.
 18 Q And what is that opinion?
 19 A Well, it's well known that chronic sinusitis
 20 or chronic infected materials dripping down from the
 21 sinuses, such as a post-nasal drip into the lungs, can
 22 trigger chronic bronchitis, asthmatic bronchitis.
 23 Certainly, again, chronic changes and chronic
 24 irritation to the lining of the sinuses can lead to
 25 nasal polyps.

1 be a good time to break for lunch and I will hear
 2 the objection. We are obviously not going to
 3 finish with the witness before lunch.
 4 It's 10 after 12. We will start at 1:45
 5 because this might take us a little while, so
 6 1:45 for the jurors. Please have a nice lunch.
 7 We will collect your notepads. Don't discuss the
 8 case and we will resume at 1:45.
 9 (Jury not present.)
 10 THE COURT: Everybody have a seat. Let me
 11 just deal with this before we go to lunch. What
 12 is your objection?
 13 MR. REILLY: The objection is, your Honor,
 14 there is a ruling by your Honor, I presume -- I
 15 don't know what Mr. Weinstein is intending to do,
 16 but my presumption was he was trying to lay a
 17 foundation.
 18 Perhaps the witness should be excused, your
 19 Honor.
 20 THE COURT: I should think perhaps the
 21 witness should proffer his answer first.
 22 MR. ENGRAM: I think the problem was he
 23 failed to lay the foundation. He was asking the
 24 ultimate question, does he have an opinion,
 25 without laying any foundation that this witness

1 Q I would like to limit it, I think I have to
 2 limit it to the sinus area, to the sinus area, can --
 3 THE COURT: Wait. Were you finished with
 4 your answer?
 5 MR. WEINSTEIN: I'm sorry.
 6 A I was going to say that a chronic
 7 inflammation to any area of the body can lead to a
 8 higher turnover of cells and the possibility of a
 9 neoplastic cell or cancer cell developing.
 10 Q Are you saying, Doctor, if we don't get into
 11 too much detail, that her chronic sinusitis is a
 12 condition, based on its original causation, based upon
 13 the continual irritation she suffers from chronic
 14 sinusitis, can lead to, within reasonable medical
 15 probability, cancer of the sinuses?
 16 A Well, any of us, again, without chronic
 17 sinusitis can develop cancer in the sinuses. I think
 18 in the rare occurrences of cancer of the sinuses, your
 19 chances are probably slightly greater if you have a
 20 chronic irritation there.
 21 Q So you do have, there is an increased risk in
 22 incurring cancer of the sinuses if you are suffering
 23 from chronic sinusitis; is that correct?
 24 A I --
 25 Q -- than somebody who doesn't have chronic

1 sinusitis?

2 A I don't know if that's been documented
3 scientifically. Again, it makes sense that if you
4 have a chronic irritation somewhere, there is a
5 possibility of a wayward cell forming.

6 Q Is that based on, is it your opinion -- I
7 mean, we know that a lot of things haven't been
8 documented, but based upon your opinion as a medical
9 doctor, based upon your experience and training as a
10 medical doctor and background generally and in your
11 expertise?

12 A I have not seen that to be the case in my
13 years of practice where patients with chronic
14 sinusitis have developed cancer of the sinuses.

15 Q But do you have an opinion that that can
16 occur as a result of the --

17 MR. REILLY: I object, your Honor. Now he is
18 calling for speculation.

19 THE COURT: I agree. I think it's calling
20 for speculation.

21 MR. WEINSTEIN: I think I need a ruling from
22 the court.

23 THE COURT: To this?

24 MR. WEINSTEIN: For the record, not in front
25 of the jury, I was going to have him talk

1 MR. REILLY: Yes, your Honor.

2 THE COURT: We probably won't get back to
3 you until we resume with the jury until whatever
4 time I said, which is 1:45. Thank you.

5 (Witness excused.)

6 THE COURT: What's the position of the
7 defendants, what's the position of the plaintiff
8 on this area?

9 MR. REILLY: Your Honor, obviously, or at
10 least apparently Mr. Weinstein was attempting to
11 get this witness to say that there was a
12 scientific basis for asserting that patients who
13 have sinusitis or people who have sinusitis are
14 at increased risk for the development of cancer
15 of the sinuses.

16 However, Mr. Weinstein asked him:

17 "Q. So you do have, there is an increased risk
18 in incurring cancer of the sinus if you are
19 suffering from chronic sinusitis; is that
20 correct?"

21 He started to answer, he was interrupted by
22 Mr. Weinstein. "-- than somebody who doesn't
23 have chronic sinusitis?"

24 His answer was:

25 "A. I don't know if that's been documented

1 about --

2 THE COURT: Wait a minute. Let's see. I
3 ruled on that last objection, sustaining the
4 objection. So what's your next question?

5 MR. WEINSTEIN: I don't have any objection.
6 I only want to make just a proffer.

7 THE COURT: What's your next question of
8 the witness? No other questions, that's it?

9 MR. WEINSTEIN: Not now for outside the
10 jury. In other words, I won't get into that
11 subject anymore, but I think what I should do,
12 Judge, you stopped me on the question, on another
13 question.

14 I assume that the court is ordering me not
15 to get into that.

16 THE COURT: I haven't done anything except
17 rule on this last objection.

18 MR. WEINSTEIN: Please excuse me, Judge.

19 THE COURT: Have you finished with your
20 proffer on this?

21 MR. WEINSTEIN: Yes, I have.

22 THE COURT: Did the defense counsel want to
23 ask anything of the witness at this point?

24 MR. REILLY: It's not necessary, your Honor.

25 THE COURT: Should we excuse the witness?

1 scientifically. Again, it makes sense that if
2 you have chronic irritation somewhere, there is a
3 possibility of a wayward cell forming."

4 Mr. Weinstein said:

5 "Q. Is that based on, is it your opinion, I
6 mean, we know that a lot of things haven't been
7 documented, but based upon your opinion as a
8 medical doctor, based upon your experience and
9 training as a medical doctor and background
10 generally and in your expertise?

11 "A. I have not seen that to be the case in
12 my years of practice where patients with chronic
13 sinusitis have developed cancer of the sinuses."

14 I didn't have to ask a question.

15 THE COURT: So based on that, what is it
16 your asking?

17 MR. REILLY: I will move that no fear of
18 cancer claim be made in this case, be permitted
19 in this case, claim for damages be permitted in
20 this case because there is no scientific basis
21 for it, there is no reasonable basis --

22 THE COURT: Are you asking that this
23 testimony --

24 MR. REILLY: I am asking that that line of
25 inquiry not be permitted of this witness.

1 THE COURT: I would be inclined to agree
2 with the defendant's position. So tell me what
3 is your position?

4 MR. WEINSTEIN: Judge, I think my obligation
5 is to the court to really concede that based on
6 that testimony, I think we all have to be candid
7 with the court.

8 You may recall, Judge, that I asked the
9 question only the way I did because as I
10 understood your prior instructions, it was that
11 we would have to relate the sinusitis -- well,
12 that we would have to get a definite answer from
13 him from the question I asked.

14 THE COURT: Right. You would have to show
15 that there was a, within reasonable medical
16 probability, a risk of developing cancer as a
17 result of the chronic sinusitis.

18 MR. WEINSTEIN: Well, if it was that, then I
19 have no -- he will definitely say that she can
20 develop lung cancer.

21 The problem is, Judge --

22 THE COURT: He didn't say anything about
23 lung cancer.

24 MR. WEINSTEIN: No, I know that. I tried to
25 restrict him to the sinuses because that's what

1 caused by sinusitis.

2 MR. WEINSTEIN: That's why I was candid.

3 MR. REILLY: In his entire practice it has
4 never occurred.

5 Now he is going to come in and talk about
6 development of lung cancer to an organ of the
7 body he doesn't even deal with.

8 THE COURT: I don't know if that's his
9 opinion. Can we get him back in to see what his
10 opinion is?

11 MICHAEL A. PERSKY, M.D., WITNESS, RESUMED.

12 THE COURT: Doctor, since you are still here,
13 we are going to ask a couple of further
14 questions.

15 Go ahead, please.

16 BY MR. WEINSTEIN:

17 Q Doctor, I am going to ask you a question.
18 Let me just ask the question and see what it is. I
19 know you will tell us. The jury is not here and you
20 will tell us straight on, the truth.

21 THE COURT: He will when the jury is here
22 too.

23 MR. WEINSTEIN: I know that.

24 THE COURT: Go ahead.

25 MR. WEINSTEIN: Very good, Judge. Thank

1 we understood your ruling to be.

2 THE COURT: No, my ruling is that from the
3 chronic sinusitis, that has to be the cause of
4 cancer.

5 MR. WEINSTEIN: Right. So that's why I
6 restricted it to that, but his opinion is that
7 she can develop cancer, as I understand it, to
8 the --

9 THE COURT: You didn't even ask him about
10 that. You are saying that if you asked him is
11 there within reasonable medical probability is
12 there a risk of developing lung cancer from
13 chronic sinusitis he would say yes?

14 MR. WEINSTEIN: Cancer to other areas of the
15 respiratory system.

16 THE COURT: From the chronic sinusitis?

17 MR. WEINSTEIN: Yes. Yes.

18 THE COURT: You didn't ask him that.

19 MR. WEINSTEIN: I think what I should do is
20 proffer it and see where it goes when he comes
21 back. It will be one question basically.

22 MS. WEINSTEIN: He is still here.

23 MR. REILLY: I object. This gentleman is an
24 otolaryngologist. He has just indicated he has
25 never seen an instance of sinus cancer being

1 you.

2 THE COURT: Go ahead.

3 BY MR. WEINSTEIN:

4 Q Doctor, I cut you off when you were talking
5 about other parts of the sinuses. Could you tell me
6 whether you have an opinion, within reasonable medical
7 probability, of whether or not Ms. French can develop
8 any other diseases to any part, any part of the
9 respiratory system as a result of the condition that
10 she was subjected to, that is, environmental smoke?

11 MR. REILLY: I object, your Honor.

12 THE COURT: Sustained. This is not what we
13 are talking about, any other diseases.

14 Q Well, can she develop -- in your opinion,
15 does she have an increased risk to any area, to the
16 respiratory system?

17 A Well, again, I think --

18 MR. REILLY: Your Honor, this has been --

19 THE COURT: I will sustain the objection.

20 Q What other risks are there, in your opinion,
21 that can, in your opinion, develop from the exposure
22 to second-hand smoke?

23 THE COURT: No, that's not so. I know there
24 is no objection. You can't ask that under the
25 cases the way I understand them. That's why I

1 reviewed that and we talked about the chronic
2 sinusitis.
3 Q As a result of the chronic sinusitis
4 condition and the irritants that she was exposed to,
5 is there an increased risk of cancer?
6 MR. REILLY: Your Honor?
7 THE COURT: You can't add in there the
8 irritants that she was exposed to.
9 MR. WEINSTEIN: All right.
10 MR. REILLY: On top of that, that question
11 has been asked and he already answered it
12 regarding sinus cancer. He already said there
13 are no documented cases, he has never experienced
14 it in his practice.
15 THE COURT: I don't think you are asking
16 what I thought you were going to be asking.
17 MR. WEINSTEIN: What did you think I was
18 going to ask?
19 I know there are certain times --
20 THE COURT: Go ahead. Is there anything
21 else to ask?
22 Q Doctor, do you have an opinion, based upon
23 reasonable medical probability, as to any other --
24 that as a result of her chronic sinusitis, that she
25 can develop any other diseases, disease?

1 MR. REILLY: Objection, your Honor. This is
2 exactly what he has tried five times now.
3 THE COURT: Yes, I will sustain the
4 objection.
5 Q What, if anything --
6 MR. REILLY: Your Honor, I would ask that
7 this inquiry cease.
8 THE COURT: I am going to let him make
9 another attempt. He will consult with his
10 colleagues here.
11 Q Do you have an opinion as to whether the
12 chronic sinusitis increases the risk of cancer in the
13 body?
14 A No.
15 THE COURT: No, you don't have an opinion?
16 THE WITNESS: No.
17 THE COURT: That ends that subject.
18 MR. WEINSTEIN: I will be candid and say --
19 THE COURT: When we resume after lunch, we
20 won't be going into this subject.
21 How much more do you have of your direct
22 examination aside from this, because you are not
23 going to go into it.
24 MR. WEINSTEIN: 10 or 15 minutes at most,
25 but Judge, I have to show you something.

1 THE COURT: Wait. Can we excuse him?
2 MR. WEINSTEIN: Yes.
3 THE COURT: Thank you, sir.
4 (Witness excused.)
5 THE COURT: What are we bringing up now?
6 MR. WEINSTEIN: There was an objection and
7 you sustained unless you learned later, unless I
8 provided to you the foundation for the question.
9 THE COURT: What is it about, through this
10 witness?
11 MR. WEINSTEIN: Yes.
12 THE COURT: Just tell me what it is.
13 MR. WEINSTEIN: The question was I asked him
14 in terms of a history, whether or not it is good
15 medicine or consistent with the standard of care
16 not to ask, for a doctor, I want you to assume
17 Dr. Stammberger --
18 THE COURT: The question was what did Dr.
19 Stammberger say about this. The objection of Mr.
20 Reilly was it was misinterpreting what
21 Stammberger said.
22 MR. WEINSTEIN: And I asked, he objected and
23 said that there is no such thing or that there is
24 no record. Here is my question.
25 THE COURT: The question to who?

1 MR. WEINSTEIN: I asked Dr. Stammberger.
2 THE COURT: That is the issue. You are
3 looking at Stammberger's testimony?
4 MR. WEINSTEIN: Yes.
5 THE COURT: Go ahead.
6 MR. WEINSTEIN: And he stated that he
7 doesn't -- in the last ten years, he doesn't
8 include the occupation of his patient.
9 THE COURT: Is that what he said?
10 MR. REILLY: Can I see the deposition?
11 MR. WEINSTEIN: Yes. Whether they are a
12 smoker or a nonsmoker, Judge.
13 MR. REILLY: Marvin, listen.
14 THE COURT: Wait a minute, Mr. Reilly.
15 Mr. Weinstein, you have to read me what he
16 said. You can't characterize it. The objection
17 was you mischaracterized it and he may have been
18 asking something about smoker or nonsmoker, not
19 about their --
20 MR. WEINSTEIN: I don't remember what my
21 question was. I want to be able to ask this
22 doctor about when you take a history, you find
23 out whether or not the person is a smoker or not.
24 THE COURT: You didn't ask this witness that
25 question.

1 MR. WEINSTEIN: Well, I am going to.

2 THE COURT: So we will take up after lunch
3 and see what you are going to be asking.
4 Apparently Dr. Stammberger -- read what
5 Stammberger said.

6 MR. REILLY: Here is the question that Mr.
7 Weinstein tried to represent to the court. You
8 see, Dr. Stammberger, and this is exactly what I
9 thought this was about.

10 Dr. Stammberger testified at length that
11 there was a period in his career when he asked
12 people whether they smoked or didn't smoke
13 because he wondered whether or not it played a
14 role in the development of sinusitis.

15 Dr. Stammberger said for a decade, maybe
16 longer, he took that information in, he assessed
17 it and after a decade or longer of determining
18 that it didn't make a dog-gone bit of difference,
19 he stopped recording whether they were smokers or
20 not because it didn't seem to him to have any
21 effect on their sinusitis or not.

22 So Mr. Weinstein was going to rely on this
23 inquiry:

24 "Q. So in the last ten or 12 years, as I
25 understand it, you don't do, basically you don't

1 that with this witness.

2 You already know he found out what Ms.
3 French's occupation was and so on.

4 MR. WEINSTEIN: It's even more important,
5 occupation -- you know, we are dealing with
6 airline --

7 THE COURT: We are going to have lunch,
8 okay? We are going to have lunch and we are
9 going to start at 1:45.

10 Do you think we will finish -- I think we
11 might finish with this witness today and maybe
12 start another witness is what I am saying, so be
13 prepared.

14 Okay, we will be in recess until 1:45.
15 (Luncheon recess at 12:30 p.m.)
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1 make any records or even or take" -- this is hard
2 to read -- "in your history whether a person is a
3 smoker, a nonsmoker or what their occupation is;
4 isn't that correct?

5 "A. As usually I am one of the final
6 instances they come to, no, I don't."

7 He had been saying at length, I mean, this
8 is the 87th --

9 THE COURT: Let me say this. I am not going
10 to let you ask that because I think it
11 mischaracterizes Stammberger's testimony if in
12 fact he made this whole other explanation about
13 why he stopped taking the history of smoker or
14 not smoker, because you would have to include all
15 that.

16 Because what you asked him, as I remember,
17 was is it bad medicine not to ask what occupation
18 your patient has.

19 MR. WEINSTEIN: Which I did include in here.

20 THE COURT: Yes, but it's not the same
21 question and apparently there was a history of
22 it.

23 Don't ask that unless you want to get into
24 all of the things that Dr. Stammberger said about
25 it and, frankly, I don't see the point of doing